(27008, 27004)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1918.

No. 917.

THE UNITED STATES, APPELLANT,

vs.

THE NORTH AMERICAN TRANSPORTATION & TRADING COMPANY.

No. 918.

THE NORTH AMERICAN TRANSPORTATION & TRADING COMPANY, APPELLANT,

vs.

THE UNITED STATES.

APPEALS FROM THE COURT OF CLAIMS.

INDEX.

113918—19——1

1 I. Petition. Filed December 7, 1906.

In the Court of Claims.

THE NORTH AMERICAN TRANSPORTATION & TRADING COMPANY, a corporation,
v.
THE UNITED STATES.

No. 29,905.

PETITION.

Filed Dec. 7, 1906.

To the honorable the Court of Claims:

The above-named petitioner, the North American Transportation & Trading Company, respectfully represents:

I.

That it is a company duly incorporated under the laws of the State of Illinois engaged in carrying on a general transportation business between different places in the United States and elsewhere, and also a general trading and supply business in various places.

2 II.

That in the due course of its business, as above recited, claimant did, on July 1, 1899, by its duly authorized agent, one N. P. R. Hatch, locate twenty acres of placer mining ground at the confluence of the Nome River and the Bering Sea in the Territory of Alaska, by complying with all legal requirements therefor, including the filing for record on August 8, 1899, at 9.55 a. m. with the officer of the United States designated for that purpose, of a location notice as follows:

"UNITED STATES OF AMERICA,
"DISTRICT OF ALASKA,
"*Cape Nome Mining District.* } ss.

"Notice is hereby given that the undersigned, having complied with the requirements of Chapter Six, Title Thirty-two, of the revised Statutes of the United States and the local customs, laws and regulations, has located twenty (20) acres of placer mining ground, situated in Cape Nome Mining District, described as follows, to wit: Commencing at a stake about 1,000 feet from the mouth of Nome River on the southeast bank thereof and at the Northwest corner stake of the N. A. T. & T. Co. trading post; thence 660 feet in a southerly direction to stake; thence 1,320 feet in an easterly direction to stake; thence 660 feet more or less in a northerly direc-

tion to stake; thence 1,320 feet in a westerly direction to stake and place of beginning."

This notice is posted on the No. 1 stake of said claim. Discovered July 1, 1899. Located July 1, 1899.

Attest:

GEO. R. WORN.
NORTH AMERICAN TRANSPORTATION &
TRADING COMPANY,
Locator,
By N. P. R. HATCH, *Its Agent*.

3 This notice was thereupon duly recorded in volume 16 at page 63 of the record kept therefor as required by law.

III.

That claimant, within one year after the discovery and location of said placer mining claim, looking to the development of said claim had erected thereon a tool and storage log house, 14 feet wide and 25 feet long, of the value of $387.50, had sunk a timbered shaft 5 by 7 by 22 feet in depth thereon of the value of $220, for the purpose of determining the value of said ground for mining purposes, and had set a line of posts 16 feet apart around the land side of said claim of the value of about $100.

IV.

That a trading site had been located by one R. J. Embleton in the vicinity of said placer mining claim containing three and three hundred sixty-nine one thousandths acres of land, which said site was transferred to claimant by said locator on November 2, 1899, as the same was described in Survey first numbered 15, and subsequently numbered 450, and duly recorded as made by C. W. Garside, Deputy United States Surveyor, on October 28, 1899.

V.

That said placer mining claim was examined by United States Deputy Mineral Surveyor, Charles W. Garside, on May 22, 1900, who made the following report of such examination; saying in part:

"I, herewith submit the following report, made in compliance therewith:

4 "The surface embraced within the exterior boundaries of the official survey of the said claim, ascends gradually from the beach of Bering Sea and abruptly from Nome River. The soil consists of decomposed mineral-bearing schists, slates and quartz, auriferous sand and gravel; upon which has been deposited a layer of loam and alluvium, covered with moss and short grass vegetation. No timber. The only stream is Nome River, along the N. W. side of the claim. A tool and storage log house, dims. 14 by 25 feet, the

N. W. corner of which bears from corner No. 1, Sur. No. 327, S. 71° 00′ E. 507 ft. dist. Value $387.50. A timbered shaft, dims. 5 by 7 by 22 ft. deep, the center of which bears from corner No. 1, Sur. No. 327, S. 51° 30′ E. 598 ft. dist. Value $220. Total expenditures made by the claimant or its grantors $607.50.

"The nearest post office to the claim is Nome City, a mining camp of about 2,000 population, located at the confluence of Snake River, with Bering Sea, about 3½ miles northwesterly from the claim. There is no known lode, or vein of quartz or other rock in place, containing any of the precious metals, within the exterior boundaries of the claim, or in the immediate vicinity. There are no mines, salt licks, salt springs, or mill seats upon the claim. This claim is a valuable deposit of auriferous ruby sand and gravel and is well adapted for placer mining. The shaft sunk near the center of the southwest side of the claim has exposes auriferous ruby sand and gravel, increasing in richness going down and after sufficient depth is attained, or bed rock struck, drifts can be run on bed rock, and by means of a pump or machinery the underground workings can be drained, and the entire claim can be advantageously and economically worked, both in winter and summer, being within close proximity to Nome City, a place of trade and mining supplies."

CHAS. W. GARSIDE,
U. S. Deputy Mineral Surveyor for Alaska.

Examination made May 22, 1900.

This report is accompanied by the following affidavit:

"OATH OF U. S. DEPUTY MINERAL SURVEYOR.

"Under General Land Office Circular 'N' of September 23, 1882.

"I, Chas. W. Garside, U. S. deputy mineral surveyor, do solemnly swear that in pursuance of an order received from the U. S. Surveyor General for Alaska, dated , 18 , I have made, under the provisions of General Land Office Circular 'N,' approved September 23, 1882, a personal and thorough examination, upon the premises, of the placer mining claim of the North American Transportation and Trading Co., known as the North American Transportation and Trading Co. Placer situate in Cape Nome Mining District, in the Yukon Land Dist., embracing an area of 15,176 acres. On unsurveyed lands and that my report of such examination hereto attached, is specific and in detail, and is a full and true statement of the facts upon all the points specified in said circular.

CHAS. W. GARSIDE,
U. S. Deputy Mineral Surveyor.

"Subscribed and sworn to by the said Chas. W. Garside, U. S. deputy mineral surveyor, before me, Marcus Roberts, this 18th day of September, 1900.

"Notary public in and for the District of Alaska."

[SEAL.]

VI.

That during the summer of 1900, a party of Army officers, consisting among others of General Randall, Major Van Orsdel, and Captain Richardson, visited claimant's placer mining claim while looking for a suitable site for a military reservation in that vicinity. Their attention was called to claimant's placer mining claim and trading site location at that time by David F. Lane and F. W. Mettler, representatives of claimant who accompanied said officers to the location.

6

VII.

That on December 20, 1900, General Orders, Number 141 was issued from the Adjutant General's Office, Headquarters of the Army, as follows:

"HEADQUARTERS OF THE ARMY,
ADJUTANT GENERAL'S OFFICE,
WASHINGTON, *December 20, 1900.*

"GENERAL ORDERS
No. 141.

"The following from the War Department is published to the Army for the information and guidance of all concerned:

WAR DEPARTMENT, WASHINGTON, *December 20, 1900.*

The President of the United States having by order of December 8, 1900, reserved from sale and set aside for military purposes the following described tract of land at Cape Nome, on Bering Sea, Alaska, on the east side of the Nome River, near its mouth, and three and one-half miles from the town of Nome, subject, however, to any legal rights which may exist to any land within its limits, the same is announced as the military reservation of Fort Davis, Alaska:

"Beginning at a stake at point of 'spit' mouth of Nome River, and running thence south of east along the coast of Bering Sea one mile; thence north to center of channel of Nome River; thence down said channel to mouth of river opposite stake first mentioned.

G. D. MEIKLEJOHN,
Acting Secretary of War.

"WAR DEPARTMENT, WASHINGTON, *December 20, 1900.*

"The President of the United States having by order of December 8, 1900, reserved from sale and set aside for military purposes the following described tract of land at Cape Nome, on Bering
7 Sea, Alaska, in the town of Nome, subject, however, to any legal rights which may exist to any land within its limits, the same is announced as a public reservation to be retained for the present under the control of the War Department:

"Initial point bearing S. 66° 50′ E. 1,669 feet from U. S. Land Mark No. 1, near mouth of Snake River; from said initial stake N.

93° E. 107 feet; thence N. 69° W. 14 feet; thence N. 27° 25′ E. 160 feet; thence S. 70° E. 152 feet; thence S. 26° 15′ W. 422 feet 8 inches to southeast corner on beach at mean high tide; thence N. 69° W. 102 feet; thence N. 27° 25′ E. 146 feet; thence N. 57° W. 35 feet to point of beginning.

G. D. MEIKLEJOHN,
Acting Secretary of War.

By command of Lieutenant General MILES;

THOMAS WARD,
Acting Adjutant General."

VIII.

That since the said order of the President dated December 8, 1900, the United States has at all times occupied and held possession of claimant's said placer claim and has prevented claimant from either developing the same or performing the annual amount of assessment work thereon as required by law.

Claimant has at all times since the United States took possession thereof protested against such taking, use, and occupancy of its property, and demanded that it be restored to the possession thereof or properly compensated therefor. Nevertheless the United States has not only denied claimant such possession but has maintained an armed force on said claim and has constructed buildings thereon and occupied the same for an Army post, to such an extent that it has been and is now impossible for claimant to carry on mining operations there, to its great loss and damage.

8 The fair and reasonable value of said placer mining claim when taken by the United States was not less than one hundred thousand dollars ($100,000). The fair and reasonable value of the use and occupancy of said claim by the United States since it was so taken by the United States on December 8, 1900, is not less than seven thousand five hundred dollars ($7,500) for each and every year since that date.

IX.

Claimant therefore, by reason of the facts herein stated avers that the said defendant, the United States, became and was indebteded to it for the value of said placer mining claim so taken from it, the sum of $100,000, and for the use and occupancy thereof from December 8, 1900, the further sum of $7,500 per annum.

In all the defendant became and was indebted to claimant in the full sum of $100,000 and $7,500 per annum from December 8, 1900, which it has declined and refused to pay, and still refuses to pay, and therefore claimant prays judgment of this court against the defendant, the said United States, for such sum; further averring that its said claim has not, nor any part thereof, nor any interest therein, been transferred or assigned by it, and that claimant is

justly entitled to said last mentioned amount from the said defendant after allowing all just credits and offsets.

THE NORTH AMERICAN TRANSPORTATION & TRADING COMPANY,
By McGOWAN, SERVEN & MOHUN,
Attorneys for petitioner.
McGOWAN, SERVEN & MOHUN,
1419 F St., N. W., Washington, D. C.

9 DISTRICT OF COLUMBIA, *City of Washington,* } ss.

Before me, the undersigned, a notary public in and for the said District and city, personally appeared A. R. Serven, one of the attorneys for the claimant herein, and being duly authorized to verify this petition, and being duly sworn deposes and says that he has read the foregoing petition and knows the contents thereof; that the matters and things therein stated of his own knowledge are true and that the matters and things therein stated upon information and belief he believes to be true.

A. R. SERVEN.

Subscribed and sworn to before me this 7th day of December, A. D. 1906.

MYDDELTON WOODVILLE,
[SEAL.] *Notary Public, D. C.*

10 II. History of proceedings.

On July 31, 1907, the defendants filed a motion to require claimant to make its petition more definite and certain.

On July 29, 1911, Messrs. Serven & Joyce filed a motion (with power attached) to be substituted as attorneys of record. On August 2, 1911, this motion was allowed by the court.

On April 26, 1915, the claimant filed an answer to the defendants' motion to make the petition more definite and certain.

On April 16, 1918, the claimant was allowed (in open court) to file an amended petition, which is as follows:

III. Amended petition. Filed April 16, 1918.

To the honorable the Court of Claims:

The above-named petitioner, the North American Transportation & Trading Co., respectfully represents:

I.

That it is a company duly incorporated under the laws of the State of Illinois engaged in carrying on a general transportation
11 business between different places in the United States and elsewhere, and also a mining and general trading and supply business in various places, and has at all times borne true allegiance

to the Government of the United States, and has not in any way voluntarily aided or abetted or given encouragement to rebellion against the said Government and that it believes the facts herein stated to be true.

II.

That in the due course of its business, as above recited, claimant did, on July 1, 1899, by its duly authorized agent, one N. P. R. Hatch, locate twenty acres of placer mining ground at the confluence of the Nome River and the Bering Sea in the Territory of Alaska, by complying with all legal requirements therefor, including the filing for record on August 8, 1899, at 9.55 a. m. with the officer of the United States designated for that purpose, of a location notice as follows:

"UNITED STATES OF AMERICA,

"*District of Alaska,*

"*Cape Nome Mining District, ss:*

"Notice is hereby given that the undersigned, having complied with the requirements of chapter 6, title 32, of the Revised Statutes of the United States and the local customs, laws, and regulations, has located 20 acres of placer mining ground, situated in Cape Nome mining district, described as follows, to wit: Commencing at a stake about 1,500 feet from the mouth of Nome River on the southeast bank thereof and at the northwest corner stake of the N. A. T. & T. Co. trading post; thence 660 feet in a southerly direction to stake; thence 1,320 feet in an easterly direction to stake; thence 660 feet more or less in a northerly direction to stake; thence 1,320 feet in a westerly direction to stake and place of beginning.

12 "This notice is posted on the No. 1 stake of said claim. Discovered July 1, 1899. Located July 1, 1899.

"NORTH AMERICAN TRANSPORTATION
& TRADING COMPANY,
Locator.

"By N. P. R. HATCH, *Its Agent.*"

"Attest:

"GEO. R. WORN."

This notice was thereupon duly recorded in volume 16, at page 63, of the record kept therefor as required by law.

III.

That claimant, within one year after the discovery and location of said placer mining claim, looking to the development of said claim, had erected thereon a tool and storage log house, 14 feet wide and 25 feet long, of the value of $387.50, had sunk a timbered shaft 5 by 7 by 22 feet in depth thereon of the value of $220.00, for the purpose of determining the value of said ground for mining purposes, and had set a line of posts 16 feet apart around the land side of said claim of the value of about $100.00.

IV.

That a trading site had been located by one R. J. Embleton in the vicinity of said placer mining claim containing three and three hundred sixty-nine one-thousandths acres of land, which said site was transferred to claimant by said locator on November 2, 1899, as the some was described in survey first numbered 15, and subsequently numbered 450, and duly recorded as made by C. W. Garside, deputy United States surveyor, on October 28, 1899.

13

V.

That said placer mining claim was examined by United States Deputy Mineral Surveyor Charles W. Garside on May 22, 1900, who made the following report of such examination, saying in part:

"I herewith submit the following report, made in compliance therewith:

"The surface embraced within the exterior boundaries of the official survey of the said claim, ascends gradually from the beach of Bering Sea and abruptly from Nome River. The soil consists of decomposed mineral-bearing schists, slates, and quartz, auriferous sand and gravel; upon which has been deposited a layer of loam and alluvium, covered with moss and short grass vegetation. No timber. The only stream is Nome River, along the N. W. side of the claim. A tool and storage log house, dims. 14 x 25 feet, the N. W. corner of which bears from corner No. 1, Sur. No. 327, S. 71° 00′ E. 507 ft. dist. Value $387.50. A timbered shaft, dims. 5 x 7 x 22 ft. deep the center of which bears from Cor. No. 1, Sur. No. 327, S. 51° 30′ E. 589 ft. dist. Value $220.00. Total expenditures made by the claimant or its grantors $607.50.

"The nearest post office to the claim is Nome City, a mining camp of about 2,000 population, located at the confluence of Snake River, with Bering Sea, about 3½ miles northwesterly from the claim. There is no known lode, or vein of quartz or other rock in place, containing any of the precious metals, within the exterior boundaries of the claim, or in the immediate vicinity. There are no mines, salt licks, salt springs, or mill seats upon the claim. This claim is a valuable deposit of auriferous ruby sand and gravel and is well adapted for placer mining. The shaft sunk near the center of the southwest side of the claim has exposes auriferous ruby sand and gravel, increasing in richness going down and after sufficient depth is
14 attained or bed rock struck, drifts can be run on bed rock, and by means of a pump or machinery the underground workings can be drained, and the entire claim can be advantageously and economically worked, both in winter and summer, being within close proximity to Nome City, a place of trade and mining supplies."

"CHAS. W. GARSIDE,

"*U. S. Deputy Mineral Surveyor for Alaska.*

"Examination made May 22, 1900."

This report is accompanied by the following affidavit:

"OATH OF U. S. DEPUTY MINERAL SURVEYOR.

"Under General Land Office Circular 'N' of September 23, 1882.

"I, Chas. W. Garside, U. S. deputy mineral surveyor, do solemnly swear that in pursuance of an order received from the U. S. Surveyor General for Alaska, dated ——— —, 18—, I have made, under the provisions of General Land Office Circular 'N,' approved September 23, 1882, a personal and thorough examination, upon the premises, of the placer mining claim of the North American Transportation and Trading Co., known as the North American Transportation and Trading Co. Placer situate in Cape Nome mining district, in the Yukon land dist., embracing an area of 15.176 acres. On unsurveyed lands and that my report of such examination hereto, attached, is specific and in detail, and is a full and true statement of the facts upon all the points specified in said circular.

"CHAS. W. GARSIDE,
"*U. S. Deputy Mineral Surveyor.*"

"Subscribed and sworn to by the said Chas. W. Garside, U. S. deputy mineral surveyor, before me, this 18th day of September, 1900.

[SEAL.] "MARCUS ROBERTS,
"*Notary Public in and for the District of Alaska.*"

15 VI.

That during the summer of 1900, a party of Army officers, consisting among others of General Randall, Major Van Orsdel, and Captain Richardson, visited claimant's placer mining claim while looking for a suitable site for a military reservation in that vicinity. Their attention was called to claimant's placer mining claim and trading-site location at that time by David F. Lane and F. W. Mettler, representatives of claimant, who accompanied said officers to the location.

VII.

That on December 20, 1900, General Orders Number 141 was issued from The Adjutant General's Office, Headquarters of the Army, as follows:

"HEADQUARTERS OF THE ARMY,
"ADJUTANT GENERAL'S OFFICE,
"*Washington December 20, 1900.*

"GENERAL ORDERS,
No. 141.

"The following from the War Department is published to the Army for the information and guidance of all concerned:

"WAR DEPARTMENT,
"*Washington, December 20, 1900.*

"The President of the United States, having by order of December 8, 1900, reserved from sale and set aside for military purposes the

following-described tract of land at Cape Nome, on Bering Sea, Alaska, on the east side of the Nome River, near its mouth, and three and one-half miles from the town of Nome, subject, however, to any legal rights which may exist to any land within its limits, the same is announced as the military reservation of Fort Davis, Alaska:

16 "'Beginning at a stake at point of "spit" mouth of Nome River, and running thence south of east along the coast of Bering Sea one mile; thence north to center of channel of Nome River; thence down said channels to mouth of river opposite stake first mentioned.

"'G. D. MEIKLEJOHN,
"'*Acting Secretary of War.*'

"WAR DEPARTMENT,
"WASHINGTON, *December 20, 1900.*

"'The President of the United States having by order of December 8, 1900, reserved from sale and set aside for military purposes the following described tract of land at Cape Nome, on Bering Sea, Alaska, in the town of Nome, subject, however, to any legal rights which may exist to any land within its limits, the same is announced as a public reservation to be retained for the present under the control of the War Department:

"'Initial point bearing S. 66° 50′ E. 1,669 feet from U. S. land mark No. 1, near mouth of Snake River; from said initial stake N. 23° E. 107 feet; thence N. 69° W. 14 feet; thence N. 27° 25′ E. 160 feet; thence S. 70° E. 152 feet; thence S. 26° 15′ W. 422 feet 8 inches to southeast corner on beach at mean high tide; thence N. 69° W. 102 feet; thence N. 27° 25′ E. 146 feet; thence N. 57° W. 35 feet to point of beginning.

"'G. D. MEIKLEJOHN,
"'*Acting Secretary of War.*'

"By command of Lieutenant General MILES.

"THOMAS WARD,
"*Acting Adjutant General.*"

VIII.

That since the said order of the President dated December 8, 1900, the United States has at all times occupied and held possession of claimant's said placer claim and has prevented claimant from

17 either developing the same or performing the annual amount of assessment work thereon as required by law.

Claimant has at all times since the United States took possession thereof protested against such taking, use, and occupancy of its property and demanded that it be restored to the possession thereof or properly compensated therefor. Nevertheless the United States has not only denied claimant such possession but has maintained an armed force on said claim and has constructed buildings thereon and

occupied the same for an Army post, to such an extent that it has been and is now impossible for claimant to carry on mining operations there, to its great loss and damage.

The fair and reasonable value of said placer mining claim when taken by the United States was not less than one hundred thousand dollars ($100,000). The fair and reasonable value of the use and occupancy of said claim by the United States since it was so taken by the United States on December 8, 1900, is not less than seven thousand five hundred dollars ($7,500) for each and every year since that date.

IX.

Claimant, therefore, by reason of the facts herein stated avers that the said defendant, the United States, became and was indebted to it for the value of said placer mining claim so taken from it, the sum of $100,000, and for the use and occupancy thereof from December 8, 1900, the further sum of $7,500 per annum.

In all the defendant became and was indebted to claimant in the full sum of $100,000 and $7,500 per annum from December 8, 1900, which it has declined and refused to pay, and still refuses to pay, and therefore claimant prays judgment of this court against the defendant, the said United States, for such sum; further averring that its said claim has not, nor any part thereof, nor any
18 interest therein, been transferred or assigned by it, and that claimant is justly entitled to said last-mentioned amounts from the said defendant after allowing all just credits and offsets.

THE NORTH AMERICAN TRANSPORTATION & TRADING COMPANY,
By McGOWAN, SERVEN & MOHUN,
Attorneys for Petitioner.

SERVEN & JOYCE,
1422 F St. N. W., Washington, D. C.

DISTRICT OF COLUMBIA,
City of Washington, ss:

Before me, the undersigned, a notary public in and for the said District and city, personally appeared A. R. Serven, one of the attorneys for the claimant herein, and being duly authorized to verify this petition, and being duly sworn, deposes and says that he has read the foregoing petition and knows the contents thereof; that the matters and things therein stated of his own knowledge are true and that the matters and things therein stated upon information and belief he believes to be true.

A. R. SERVEN.

Subscribed and sworn to before me this 15th day of April, A. D. 1918.

[SEAL.]

W. B. JAYNES,
Notary Public, D. C.

19 IV. General traverse.

Court of Claims.

THE NORTH AMERICAN TRANSPORTATION & TRADING COMPANY, a Corporation,

vs.

THE UNITED STATES

No. 29905.

No demurrer, plea, answer, counterclaim, set-off, claim of damages, demand, or defense in the premises, having been entered on the part of the defendants, a general traverse is entered as provided by Rule 34.

V. Argument and submission of case.

On April 16, 1918, this case was argued and submitted by A. R. Serven, Esq., for the claimant, and by R. P. Whiteley, Esq., for the defendants.

20 VI. Findings of fact, conclusion of law, and opinion of the court, by Hay, J. Filed April 29, 1918.

This case having been heard by the Court of Claims, the court, upon the evidence, makes the following

FINDINGS OF FACT.

I.

The plaintiff is a duly organized corporation under the laws of the State of Illinois and at all times hereinafter mentioned was engaged in carrying on the business of transportation, trading, and mining in the United States, the Territory of Alaska, and elsewhere.

II.

On July 1, 1899, the plaintiff by its duly authorized agent, N. P. R. Hatch, discovered and duly located a placer-mining claim of fifteen and one-half acres on the public domain of the United States near the confluence of the Nome River and Bering Sea, in the Territory of Alaska, by complying with all legal requirements therefor. Thereafter, on August 8, 1899, plaintiff, by its duly authorized agent, filed for record in the office of the recorder for the Cape Nome mining district the location notice, which was thereupon duly recorded in Volume XVI at page 63 of the official records of said recorder's office, which said location notice complied in all respects with the laws of the United States.

III.

Before the end of the year following the location of this claim, the plaintiff, by its agents, had erected thereon a tool and storage log cabin about 14 by 25 feet in size and sunk six or seven prospect pits to a depth of from 7 to 10 feet about 100 feet apart on said
21 claim, and a timbered shaft 5 by 7 feet and 22 feet in depth, which pits and shaft disclosed a deposit of auriferous ruby sand and gravel, and showed that the claim was well adapted for placer mining. The plaintiff also had placed a line of posts around the exterior land boundaries of said claim, all of which, including the cost of said cabin, amounted to an expenditure thereon of about $600. The plaintiff has been paid by the United States for the cabin erected on said claim.

The plaintiff during said year made due application for a survey for patent to said placer claim and also had the claim surveyed by a United States deputy mineral surveyor, Charles W. Garside.

IV.

Gen. Randall, an officer of the Army of the United States commanding the United States troops in Alaska, on or about July 1, 1900, without lawful authority, took possession of a tract of land in which was included the mining claim of the plaintiff. The plaintiff, being unable to withstand the authority of said officer, gave him possession of said mining claim, at the same time demanding compensation therefor, and this was promised it by the said officer.

He then recommended to the Secretary of War that said tract of land be used as a site for an Army post; and on December 8, 1900, the President of the United States issued an order reserving from sale and setting aside for military purposes the tract of land in which was included the mining claim of the plaintiff. The President in said order stated that said land was reserved and set aside subject to any legal rights which might exist to any land within its limits. The United States have been in possession of said tract of land, including the mining claim of the plaintiff, and have established thereon a military post, upon which they have erected buildings, and have taken and occupied said tract of land for more than 17 years.

At no time since Gen. Randall took possession of said land has the plaintiff been able to operate its claim or do any further mining work thereon because of the taking by the United States of said tract of land, which includes the mining claim of the plaintiff, the buildings erected by the United States being on that portion of the land whereon is located the mining claim of the plaintiff.

V.

The reasonable value of the mining claim of the plaintiff when it was taken under authority of the President's order of December 8, 1900, was $23,800.

CONCLUSION OF LAW.

The court upon the foregoing findings of fact decides as a conclusion of law that the plaintiff is entitled to recover the sum of $23,800. It is therefore adjudged and ordered that the plaintiff recover of and from the United States the sum of twenty-three thousand eight hundred dollars ($23,800).

22 OPINION.

Hay, Judge, delivered the opinion of the court:

The plaintiff brings this suit to recover the value of a mining claim taken from it by the defendants. On July 1, 1899, the plaintiff discovered and duly located a placer mining claim on the public domain of the United States near the Nome River and Bering Sea in the Territory of Alaska. It complied with all legal requirements in locating said claim and filed for record in the office of the recorder for the Cape Nome mining district the location notice, which was duly recorded in Volume XVI, page 63, of the official records of said recorder's office. The said notice complied in all respects with the laws of the United States. Before the end of the year following the location of the aforesaid claim the plaintiff had erected thereon a tool and storage log cabin about 14 by 25 feet in size and had sunk six or seven prospect pits to a depth of from 7 to 9 feet about 100 feet apart on said claim and had sunk a timbered shaft 5 by 7 feet and 22 feet in depth. These pits and shaft disclosed a deposit of auriferous ruby sand and gravel and showed that the claim was well adapted for placer mining. The plaintiff also had placed around the exterior land boundaries of said claim a line of posts, all of which, including the cost of said cabin, amounted to an expenditure on the claim of $600. This cabin was afterwards paid for by the United States. The plaintiff during the year 1899 and 1900 made application for a survey for patent to said placer claim, and also had the claim surveyed by the United States deputy mineral surveyor.

About July 1, 1900, Gen. Randall, an officer of the Army of the United States, who at that time commanded the troops of the United States in Alaska, took possession of a tract of land, including the mining claim of the plaintiff, and announced that he intended to use the same as a site for an Army post. He was not then authorized to select any part of the public domain for that purpose, nor had the President of the United States reserved or set apart any of said tract of land for military purposes. However, he called upon the plaintiff to give possession of its said mining claim, and the plaintiff, not being able to withstand his authority, but at the same time demanding compensation for its said claim, gave up the possession thereof to said officer. Gen. Randall then recommended to the Secretary of War that said tract of land should be used as a site for an Army post, and on December 8, 1900, the President of the United States issued an order reserving from sale and setting aside for military purposes the

tract of land in which was included the mining claim of the plaintiff. The petition in this case was filed on the 7th day of December, 1906.

The tract of land so taken by the United States, in which tract was included the mining claim of the plaintiff, has been occupied by the defendants and used by them as an Army post ever since the order of the President was issued, and the buildings erected on said land are located on that portion of the land whereon is located the mining claim of the plaintiff. And by reason of the taking of this land by the defendants the plaintiff has been unable to operate its claim or to do any further mining work thereon.

The facts above recited show that the plaintiff had acquired a right to this placer claim by fully complying with the law, and that
23 the United States had notice of the claim of the plaintiff when the land on which it was located was taken by the defendants for military purposes. A mining claim which has been perfected in accordance with law is property, and when perfected it has the effect of a grant by the United States of the right of present and exclusive possession. Belk v. Meagher, 104 U. S., 279, 283.

Where there is a valid location of a mining claim, the area becomes segregated from the public domain and the property of the locator. St. Louis Mining Co. v. Montana Mining Co., 171 U. S., 650, 655. In the case of Gwillim v. Donnellan, 115 U. S., 45, 49, the court says: "A valid and subsisting location of mineral lands, made and kept up in accordance with the provisions of the statutes of the United States, has the effect of a grant by the United States of the right of present and exclusive possession of the lands located." And the locator, in the opinion of the court, will be entitled to possession against the United States as well as against any other defendant.

The title to the land which was set apart for military purposes was in the United States, but the mining claim of the plaintiff which it had perfected under the provisions of the statutes of the United States was its property, and if taken from it by the United States it is entitled to just compensation therefor under the fifth amendment of the Constitution.

It is always more or less difficult to determine the value of mining property. In this case the evidence is conflicting and witnesses in the case differ widely as to the value of the mining claim of the plaintiff. One witness puts its value at $300,000, while another witness says it has no value at all. But that the claim has some value may, we think, be deduced from all the evidence in the case. There is, of course, in it an element of speculation, but situated as it was in a country where claims of this character were constant subjects of barter and sale and where similar claims had yielded large fortunes to their discoverers, it may well be said that if the claim had been exploited it would have been one of considerable if not of great value. At best, evidence of its value is largely a matter of opinion, and taking into account the opportunities of the witnesses to form intelligent judgments who have testified in this case, we are of the opinion that the value of the

plaintiff's claim when it was taken by the defendants was $23,800, and judgment will be entered for that amount in favor of the plaintiff. It is so ordered.

Downey, Judge; Barney, Judge; Booth, Judge; and Campbell, Chief Justice, concur.

24 VII. Judgment of the court.

At a Court of Claims held in the City of Washington on the 29th day of April, A. D. 1918, judgment was ordered to be entered as follows:

The court, upon due consideration of the premises, find in favor of the claimant, and do order, adjudge, and decree that The North American Transportation and Trading Company, a corporation, as aforesaid, is entitled to recover and shall have and recover of and from the defendants, the United States, the sum of twenty-three thousand and eight hundred dollars ($23,800).

BY THE COURT.

VIII. History of proceedings after entry of judgment.

On June 26, 1918, the defendants filed a motion for a new trial and for amendment of findings.

On November 11, 1918, this motion was overruled by the court.

25 IX. Defendants' application for and allowance of an appeal.

From the judgment rendered in the above-entitled cause on the 11th day of November, 1918, in favor of claimant, the defendants, by their Attorney General, on the 7th day of February, 1919, make application for, and give notice of, an appeal to the Supreme Court of the United States.

WM. L. FRIERSON,
Assistant Attorney General.

Filed February 7, 1919.

Ordered: That the above appeal be allowed as prayed for.

Feb. 10, 1919.

BY THE COURT.

X. Claimant's application for and allowance of an appeal.

From the judgment rendered in the above-entitled cause on the 11th day of November, 1918, the claimant by its attorneys, this 8th day of February, 1919, makes application for, and gives notice of, an appeal to the Supreme Court of the United States.

SERVEN & JOYCE,
Attorneys for Claimant.

Filed February 8, 1919.

Ordered: That the above appeal be allowed as prayed for.

Feb. 10, 1919.

BY THE COURT.

THE NORTH AMERICAN TRANSPORTATION & TRADING COMPANY, a Corporation,
vs.
THE UNITED STATES. } No. 29,905.

I, Sam'l. A. Putman, Chief Clerk Court of Claims, certify that the foregoing are true transcripts of the pleadings in the above-entitled cause; of the argument and submission of case; of the findings of fact, conclusion of law, and opinion of the court by Hay, J.; of the judgment of the court; of the application of the defendants and claimant for, and the allowance of, appeals to the Supreme Court of the United States.

In testimony whereof I have hereunto set my hand and affixed the seal of said court at Washington City this twelfth day of February, A. D. 1919.

SAM'L A. PUTMAN,
[SEAL.] *Chief Clerk Court of Claims.*

(Endorsed:) File No. 27,003. Court of Claims. Term No. 917. The United States, Appellant, *vs.* The North American Transportation & Trading Company. File No. 27,004. Term No. 918. The North American Transportation & Trading Company, Appellant, *vs.* The United States. Filed March 15th, 1919. File Nos. 27,003 and 27,004.

○

In the Supreme Court of the United States.

OCTOBER TERM, 1919.

THE UNITED STATES, APPELLANT,
v.
NORTH AMERICAN TRANSPORTATION COMPANY. } No. 319.

Appeal from Court of Claims.

MOTION OF APPELLANT TO REMAND FOR ADDITIONAL FINDINGS OF FACT.

Now comes the appellant, by the Solicitor General, and moves the court to remand this case to the Court of Claims with instructions to make and certify as part of the record herein findings of fact on the several questions of fact following, to wit:

I.

Whether or not George M. Randall, brigadier general commanding the Department of Alaska on September 3, 1900, wrote the following letter from headquarters of the Department of Alaska to The Adjutant General, United States Army, Washington, D. C. (C. Cls. Rec., 104, 105):

HEADQUARTERS DEPARTMENT OF ALASKA,
FORT ST. MICHAEL, ALASKA,
September 3, 1900.

TO THE ADJUTANT GENERAL,
UNITED STATES ARMY,
Washington, D. C.

SIR: I have the honor to request that an Executive order be issued setting apart the

following-described tract of land in the town of Nome, Alaska, viz: Initial point bearing S. 66° 50′ E. 1,669 feet, from United States landmark No. 1 near mouth of Snake River; from said initial stake N. 23° E. 107 feet; thence N. 69° W. 14 feet; thence N. 27° 25′ E. 160 feet; thence S. 70° E. 152 feet; thence S. 26° 15′ W. 422 feet 8 inches to southeast corner on beach at mean high tide; thence N. 69° W. 102 feet; thence N. 27° 25′ E. 146 feet; thence N. 57° W. 35 feet to point of beginning.

This piece of ground has been occupied by the detachment stationed in the town of Nome for the past year, and its irregular shape is due to the boundary lines not having been accurately established in the beginning.

It is desired to retain this ground under the War Department for the present, but to allow the court and customs services to use it and the buildings thereon temporarily, as indicated in my telegram of August 2, 1900, provided the detachment of troops can be safely withdrawn to the post proper at the mouth of Nome River.

I have the honor further to recommend the setting apart of the following-described tract of land near the mouth of the Nome River, upon which the buildings for the permanent post are being erected, viz: Beginning at a stake at point of "spit," mouth of Nome River, and running thence south of east along the coast of Bering Sea 1 mile; thence north to center of channel of Nome River; thence

down said channel to mouth of river opposite stake first mentioned.

Very respectfully,

GEO. M. RANDALL,
Brigadier General, U. S. V.,
Commanding Department.

[First indorsement.]

ADJUTANT GENERAL'S OFFICE,
Washington, October 3, 1900.

Respectfully submitted to the Secretary of War.

H. C. CORBIN,
Adjutant General.

II.

Whether or not on March 9, 1900, and also on September 19 and September 26, 1900, the Secretary of War, from appropriations made by Congress, authorized and approved the expenditure of thousands of dollars in the erection of barracks and other buildings upon the land located as a placer mining claim by the North American Transportation and Trading Company (report of War Department filed June 26, 1918, in the Court of Claims).

III.

Whether or not the military authorities of the United States retained continuous possession of the land located as a placer mining claim by the North American Transportation and Trading Company, from July 1, 1900, to December 8, 1900, the date of

the issuance of the Executive Order withdrawing the land from entry. (C. Cls. Rec. 64; 80–81; 104–105; 108–111; 114–117.)

The Court of Claims failed to make findings of fact on foregoing questions although requested so to do by appellant.

ALEX. C. KING,
Solicitor General.
FRANK DAVIS, JR.,
Assistant Attorney General.

BRIEF.

STATEMENT.

This suit was brought in the Court of Claims for compensation for the taking and use by the military authorities of the United States of some fifteen acres of land located by appellee as a placer gold mining claim, near the town of Nome, Alaska. On July 1, 1899, the plaintiff discovered and duly located this claim on the public domain of the United States near the confluence of the Nome River and Behring Sea. During the years 1899 and 1900 the requisite assessment work was done and the claim was surveyed for the appellee by the United States deputy mineral surveyor.

On or about July 1, 1900, General Randall, United States Army, commanding the Department of Alaska, took possession of a tract of land including the mining claim of appellee, and announced that he intended to use same as a site for an Army post. The appellee, being unable to withstand the authority of said officer, gave him possession of said mining claim, at the same time demanding compensation therefor, and this was promised by General Randall. On September 3, 1900, General Randall wrote the Adjutant General, United States Army, Washington, D. C., recommending the issuance of an Executive order setting apart a certain tract of land near the mouth

of the Nome River, which included appellee's claim, "upon which buildings for the permanent post are being erected." This report was submitted to the Secretary of War by the Adjutant General on October 3, 1900, and in accordance with the recommendation, on December 8, 1900, the President of the United States issued an order reserving from sale and setting aside for military purposes the tract of land in which was included appellee's mining claim, stating that said land was reserved and set aside subject to any legal rights that might exist to any lands within its limits.

The tract of land so taken by the United States has been occupied and used as an Army post since possession was first taken, and the buildings that have been erected on said land are located on that portion of the tract which had been the placer claim of appellee.

Appellee's petition was filed in the Court of Claims December 7, 1906. On April 29, 1918, findings of fact and conclusions of law were made by the court and judgment entered for appellee in the sum of $23,800. On January 26, 1918, appellant filed a motion for a new trial and for amendment of the findings, which motion was overruled on November 11, 1918. On February 7, 1919, appellant made application for an appeal to the Supreme Court, which appeal was allowed February 10, 1919.

ARGUMENT.

At the trial of this cause appellant pleaded the bar of the statute of limitations, alleging that the land in

question had been taken under the right of eminent domain on or about July 1, 1900, or in all events prior to December, 1900. The petition was not filed until December 7, 1906. The court was requested to find that immediately upon taking possession of the land the army officers and their assistants began to erect barracks and other military buildings thereon and that permanent possession was taken from July 1, 1900. The record shows that on September 3, 1900, the general commanding the Department of Alaska had written the Adjutant General advising him that buildings for the permanent post near the mouth of the Nome River were then being erected, and this fact was not controverted in any way by the appellee. The Court of Claims, however, has failed to find this fact and has merely found that "The United States have been in possession of said tract of land, including the mining claim of the plaintiff, and have established thereon a military post upon which they have erected buildings, and have taken and occupied said tract of land for more than 17 years" (p. 13, Tr. Rec.).

The indefinite statement that the land has been occupied for more than 17 years does not sufficiently present the real facts to the appellate court so that it can be determined when the taking actually occurred. Appellant is, therefore, clearly entitled to a finding setting forth the fact that as early as September 3, 1900, Gen. Randall, commanding the Department of Alaska, advised the Adjutant General, and through him the Secretary of War, that the

buildings for the permanent post were then being erected upon appellee's property.

Defendant also asks that the court be required to find definitely the length of time that the plaintiff's property has been in the possession of the United States instead of the indefinite statement that it has been occupied for more than 17 years. It is requested, therefore, that it be found as a fact whether or not the United States have been in continuous possession of the land since July 1, 1900. This is a fact that is not controverted in any way in the record, and while it may be inferred from the last paragraph of the court's fourth finding, it is submitted that there should be no doubt as to such an essential fact.

In the motion for a new trial, filed in due time in the court below, appellant also requested the court to find that from appropriations made by Congress the Secretary of War on March 9, 1900, and also on September 19 and September 26, 1900, authorized and approved the expenditure of thousands of dollars in the erection of barracks and other permanent buildings upon the land in question.

There can be no doubt that appellant is entitled to such a finding, so that the legal effect of the same may be determined by this court. It will be argued that the action of the Secretary of War in authorizing the expenditure of money upon the erection of buildings upon appellee's land, the expenditure being made from an appropriation provided by Congress, gave the necessary ratification and sanction to the

act of the Army officer, and if that be so, the legal taking occurred on or about July 1, 1900, or, in any event, prior to December, 1900.

> It seems clear that these property rights have been held and used by the agents of the United States under the sanction of legislative enactments by Congress, for the appropriation of money specifically for the construction of the dam from the Maryland shore to Conn's Island was, all the circumstances considered, equivalent to an express direction by the legislative and executive branches of the Government to its officers to take this particular property for the public objects contemplated by the scheme for supplying the Capital of the Nation with wholesome water. The making of the improvements necessarily involves the taking of the property; and if, for the want of formal proceedings for its condemnation to public use, the claimant was entitled at the beginning of the work to have the agents of the Government enjoined from prosecuting it until provision was made for securing in some way payment of the compensation required by the Constitution—upon which question we express no opinion—there is no sound reason why the claimant might not waive that right and, electing to regard the action of the Government as a taking under its sovereign right of eminent domain, demand just compensation. *Kohl* v. *United States*, 91 *United States* v. *Great Falls Mfg. Co.*, 112 U. S. 645, 656. U. S. 367, 374.

Here it is the purpose and right of appellant to have the facts found, so that the legal effect may be determined by this court. (*United States* v. *Pugh*, 99 U. S., 265.)

The Court of Claims in its opinion states that Gen. Randall took possession of a tract of land including the mining claim of appellee about July 1, 1900, but that he was not then authorized to select any part of the public domain for that purpose, nor had the President of the United States reserved or set aside any of said tract of land for military purposes. The court further states that Gen. Randall recommended to the Secretary of War that said tract should be used for an Army post, and that on December 8, 1900, the President issued an order reserving the same from sale and setting it aside for military purposes; that the tract so taken has been occupied by the United States and used as an Army post ever since the order of the President was issued, and that buildings erected on said land are located on that portion of the land whereon is located the mining claim of appellee.

Here again defendant repeats that the record shows the tract taken to have been occupied by the United States and used as an Army post not only since the order of the President was issued, but since July 1, 1900, and these facts should be found by the Court of Claims so that this court can determine when the taking under the right of eminent domain actually occurred. It is submitted that since the appellee had established possessory title to his mining claim prior

to July 1, 1900, the said title could not be taken from him by any officer of the United States without the authority of Congress, either expressly or by necessary implication.

This authority is found in the Army appropriation acts, particularly the act of March 7, 1900, authorizing the expenditure of the public funds upon barracks and quarters and leaving the designation of the barracks and quarters and the amounts to be expended (within the limits of the appropriation) to the discretion of the Secretary of War. The Secretary of War exercised that discretion on March 9, 1900, when he approved the expenditure of $50,000 for barracks and quarters at Cape Nome, and again on September 19 and on September 26, 1900, when he authorized and approved the expenditure of thousands of dollars upon the barracks and other buildings then being erected upon the premises. These facts are all contained in the newly discovered evidence filed in the Court of Claims in support of motion for a new trial, said evidence not having been known to the Attorney General or his assistants before the case was tried and due effort having been made before trial to obtain such evidence. Appellant is therefore entitled to the findings of fact requested, which show the appropriation of money by Congress for the erection of barracks upon appellee's land, as showing that the devotion of this land to a public use has been authorized by Congress. If there has been no such authorization, the act of the President in withdrawing the land from entry could not create a claim against the Govern-

ment any more than the act of the officer who took possession on July 1, 1900, which the court below has found to be without lawful authority. This presidential reservation withdrew what the United States then owned. It was not and did not seek to appropriate any legal rights to any land already acquired. These were to be acquired by other means. (This order simply made a public *reservation*.)

The suit in this case is based on the acquiescence of plaintiff in the legality of the taking of General Randall under the authority of the act of March 7 1900, and the action of the Secretary of War thereunder.

> If an officer of the United States assumes, by virtue alone of his office, and *without the authority of Congress*, to take such matters under his control, he will not, in any legal or constitutional sense, represent the United States, and what he does or omits to do, without the authority of Congress, can not create a claim against the Government "founded upon the Constitution." It would be a claim having its origin in a violation of the Constitution. The constitutional prohibition against taking private property for public use without just compensation is directed against the Government, and not against individual or public officers proceeding without the authority of legislative enactment. The taking of private property by an officer of the United States for public use, without being authorized, expressly or by necessary implication to do so by some act of Congress, is not the act of the Government.

> So that whether we look at the jurisdiction of the court below, in respect either of claims *alleged to be* founded upon the Constitution or to arise from contract, the plaintiffs can not maintain this *suit* against the Government; for they have received the entire sums which Congress appropriated to be paid out of the Treasury on account of rent of buildings or quarters for the Civil Service Commission. (*Hooe* v. *United States*, 218 U. S., 322–336, at p. 335.)

It seems clear, therefore, that if there has been any legal taking it has been from July 1, 1900, the time that physical possession was taken by the military authorities, or shortly thereafter, when buildings were erected upon the land under the authorization of the Secretary of War, from appropriations made by Congress for that purpose. It is equally clear that appellant is entitled to the additional findings of fact requested, from which this court can determine their legal effect, the said facts being undisputed and no weighing of evidence required.

CONCLUSION.

It is respectfully submitted that the motion herein prayed for should be granted and the case remanded for further proceedings.

ALEX. C. KING,
Solicitor General.
FRANK DAVIS, JR.,
Assistant Attorney General.

○

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1919.

No. 319.

THE UNITED STATES, APPELLANT,

vs.

THE NORTH AMERICAN TRANSPORTATION COMPANY, APPELLEE.

APPEAL FROM THE COURT OF CLAIMS.

BRIEF OF APPELLEE IN OPPOSITION TO MOTION OF APPELLANT TO REMAND FOR ADDITIONAL FINDINGS OF FACT.

ABRAM R. SERVEN,
BURT E. BARLOW,
Attorneys for Appellee.

TABLE OF CONTENTS.

TABLE OF CASES.

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1919.

No. 319.

THE UNITED STATES, APPELLANT,

vs.

THE NORTH AMERICAN TRANSPORTATION COMPANY, APPELLEE.

APPEAL FROM THE COURT OF CLAIMS.

BRIEF OF APPELLEE IN OPPOSITION TO MOTION OF APPELLANT TO REMAND FOR ADDITIONAL FINDINGS OF FACT.

Statement of Facts.

On or about July 1, 1900, General Randall, claiming to act on behalf of the United States, but without lawful authority, seized appellant's property situated near Nome, Alaska, in anticipation of the establishment of a military post in that locality by proper authority.

By presidential order of December 8, 1900, the property of appellee was lawfully taken as a United States military reservation or fort and has been in possession of the United States since that date (Finding of Fact IV, Rec., page 13). No compensation was ever paid for the taking of the property and appellee has been deprived of the use and occupation of its property and of the reasonable value thereof since the lawful taking of the property by the United States, December 8, 1900. The findings in the court below brought in issue by the motion for remand are numbers IV and V and are as follows (Rec., p. 13):

IV.

"Gen. Randall, an officer of the Army of the United States commanding the United States troops in Alaska, on or about July 1, 1900, without lawful authority, took possession of a tract of land in which was included the mining claim of the plaintiff. The plaintiff, being unable to withstand the authority of said officer, gave him possession of said mining claim, at the same time demanding compensation therefor, and this was promised it by the said officer.

"He then recommended to the Secretary of War that said tract of land be used as a site for an Army post; and on December 8, 1900, the President of the United States issued an order reserving from sale and setting aside for military purposes the tract of land in which was included the mining claim of the plaintiff. The President in said order stated that said land was reserved and set aside subject to any legal rights which might exist to any land within its limits. The United States have been in possession of said tract of land, including the mining claim of the plaintiff, and have established thereon a military post, upon which they have erected buildings, and have taken and occupied said tract of land for more than 17 years.

"At no time since Gen. Randall took possession of said land has the plaintiff been able to operate its

claim or do any further mining work thereon because of the taking by the United States of said tract of land, which includes the mining claim of the plaintiff, the buildings erected by the United States being on that portion of the land whereon is located the mining claim of the plaintiff."

V.

"The reasonable value of the mining claim of the plaintiff when it was taken under authority of the President's order of December 8, 1900, was $23,800."

The opinion of the court, pages 14 and 15 of the record, contains the following:

"About July 1, 1900, Gen. Randall, an officer of the Army of the United States, who at that time commanded the troops of the United States in Alaska, took possession of a tract of land, including the mining claim of the plaintiff, and announced that he intended to use the same as a site for an Army post. He was not then authorized to select any part of the public domain for that purpose, nor had the President of the United States reserved or set apart any of said tract of land for military purposes. However, he called upon the plaintiff to give possession of its said mining claim, and the plaintiff, not being able to withstand his authority, but at the same time demanding compensation for its said claim, gave up the possession thereof to said officer. Gen. Randall then recommended to the Secretary of War that said tract of land should be used as a site for an Army post, and on December 8, 1900, the President of the United States issued an order reserving from sale and setting aside for military purposes the tract of land in which was included the mining claim of the plaintiff. The petition in this case was filed on the 7th day of December, 1906.

"The tract of land so taken by the United States, in which tract was included the mining claim of the

> plaintiff, has been ocupied by the defendants and used by them as an Army post ever since the order of the President was issued, and the buildings erected on said land are located on that portion of the land whereon is located the mining claim of the plaintiff. And by reason of the taking of this land by the defendants the plaintiff has been unable to operate its claim or to do any further mining work thereon."

The appellant's motion for remand is composed of three separate requests:

1. Appellant's request that part of its evidence on the question of whether the taking by General Randall on or about July 1, 1900, was authorized or unauthorized be specifically found by the lower court in addition to the finding of fact by the lower court that such taking was "without lawful authority."

2. Appellant's request that a finding of fact be made by the lower court as to whether the Secretary of War approved the expenditure of money in the erection of barracks upon appellant's land on March 9, 1900, September 19, 1900, and September 26, 1900. Such request is not based upon any evidence introduced in the trial of the case in the lower court and which forms part of the record upon which the findings of fact of the lower court were made, but is based upon a report of the War Department which formed a part of appellant's motion for new trial in the lower court. This motion for new trial was denied and the report of the War Department upon which this finding is based did not become part of the evidence in the case and is not now part of the evidence in the case.

3. Appellant requests a finding of fact as to whether or not the military authorities of the United States retained continuous possession of the land located as a placer mining

claim by appellee from July 1, 1900, to December 8, 1900, claiming the findings of fact are not definite as to this fact.

Appellee will discuss the merits of appellant's requests for remand in their order.

ARGUMENT.

Subdivision two of rule one of the rules of this court relating to appeals from the Court of Claims provided in part as follows:

> "2. A finding by the Court of Claims of the facts in the case, established by the evidence, in the nature of a special verdict, but not the evidence establishing them."

The Court of Claims will be presumed to have fully complied with the rules of this court in making its findings of fact, and unless it clearly appears that evidence was introduced proving a fact not found and material to the issues this court will not remand a case for further findings of fact.

United States *vs.* Adams, 76 U. S., 554.

This court will not review the evidence submitted to the Court of Claims on a disputed question of fact. The findings of the Court of Claims are final as to the facts found.

Mahan *vs.* United States, 81 U. S., 109.

1. The Court of Claims found, as a matter of fact, that General Randall, in taking possession of plaintiff's property on or about July 1, 1900, acted "without lawful authority."

(Findings of Fact IV, page 13.)

The question as to whether an agent possesses any authority to act for his principal is a question of fact and is to be proved as any other fact.

> "Agency is a fact to be proved, as any other fact; and the apparent authority of an agent is to be gath-

> ered from all the facts and circumstances in evidence, and is a question for the jury."
>
> W. R. I. Co. *vs.* Leach, 32 Okla., 706-711.

To the same effect are the cases of

> Hankinson *vs.* Lombard, 25 Ill., 572-574;
> Gleen *vs.* Savage, 14 Ore., 567-577;

and for an extended digest of cases of similar import from most, if not all, of the States, see Cent. Digest. Principal and Agent, vol. 40, sec. 724, page 598 *et seq.*

The weighing of these facts, their materiality to the issue, what probative force they have, if any, is the province of the lower court. This court does not weigh the evidence, but passes upon the law applicable to the facts as found by the lower court. The Court of Claims has found, and rightly found, that General Randall had no authority to seize appellee's land. This is not a finding that General Randall was possessed of authority, the scope of which did not include the right to seize appellee's land, but is a finding that in fact he had no authority whatever to seize appellee's property. It is this finding of fact by the lower court that the appellant desires to review in this court under cover of a motion for additional findings.

The lower court has held that there is no evidence in the case showing that General Randall was authorized to take possession of appellee's property. The appellant moves this court in its first request for additional findings to have the lower court incorporate in its findings of fact the evidence claimed to show authority upon the part of General Randall to act for the United States. The motion is in itself directly opposed to the rule of this court, which directs that the evidence establishing the facts in the case shall not be included in the findings of fact of the Court of Claims. For this reason appellant's motion as to the first additional fact to be found should be denied. United States *vs.* Societe Anonyme-Cail, 224 U. S., 309-329.

2. Again, before a motion for remand is granted it must appear that the fact asked to be found is material and could be the basis for an argument of law in this court.

The letter from General Randall to the Adjutant General of the United States which appellant asks to be incorporated in the record is a declaration on the part of an agent as to his authority and as such could not be used as evidence showing his authority. The authority of General Randall to take the property of a private citizen in time of peace must be established by positive authority either from Congress or from the Secretary of War and could not be proved by any statements made by General Randall. This rule as to the proof of the authority of an agent is so well settled as to hardly require the citation of authority to support it. The following quotation, however, from Mechem on Agency, sec. 100, is given:

> "The authority of an agent where the question of its existence is directly involved, can only be established by tracing it to its source in some word or act of the alleged principal. The agent cannot confer authority upon himself."
>
> See also Cunningham *vs.* Macon R. R. Co., 109 U. S., 446.

If this court should remand this case for a finding in accordance with appellant's first request and such finding should be incorporated in the record, even then it would not be material, for it could not be used as the basis for an argument showing authority in General Randall to seize appellee's land. Otherwise the United States could be held liable for practically every tort of its officers, for in nearly every instance the officer claims to act with authority. For this reason, in addition to the reason first given, the first request for remand should be denied.

3. Again, the letter referred to in appellant's first request was introduced in evidence in the court below and it was urged

by appellant that the letter showed that prior to its date the United States had constructed buildings upon appellee's land and that this fact was known by the Secretary of War and approved by him. The lower court took this matter under consideration and found, and rightfully found, that the letter so offered by appellant was no evidence of the fact claimed by it, because, among other things, the land upon which the letter states buildings were being erected was not the land which appellee owned but was a much larger piece of land, particularly described as follows:

> "Beginning at a stake at point of 'spit,' mouth of Nome River, and running thence south of east along the coast of Bering Sea 1 mile; thence north to center of channel of Nome River; thence down said channel to mouth of river opposite stake first mentioned." (Motion for Remand, pp. 2-3.)

Whereas the land owned by appellee is described as follows:

> "Commencing at a stake about 1,500 feet from the mouth of Nome River on the southeast bank thereof and at the northwest corner stake of the N. A. T. & T. Co. trading post; thence 660 feet in a southerly direction to stake; thence 1,320 feet in an easterly direction to stake; thence 660 feet more or less in a northerly direction to stake; thence 1,320 feet in a westerly direction to stake and place of beginning" (R., p. 7).

From this it will be noted that the commencing point of appellee's land is more than a quarter of a mile from the commencing point of the land mentioned in General Randall's letter and that the greatest extent of appellee's land is 1,320 feet, whereas the greatest extent of the land mentioned in General Randall's letter is one mile. From this it clearly appears that the letter does not show, as urged by appellant, that any buildings were erected upon appellee's land, but on the contrary it would be presumed that the buildings were being erected upon the other land mentioned in

General Randall's letter which was rightfully in the possession of the United States. From the facts heretofore immediately called to the court's attention appellee believes that it will clearly appear to the court that the first request for remand made by appellant should be denied, because it raises a disputed question of fact which has been passed upon by the lower court.

II.

The second request for additional findings is most unusual and could not be complied with in the present state of the record, even though ordered by this court. The taking of evidence in this case in the lower court was closed, and the case was argued and submitted to the lower court April 16, 1918 (Rec., p. 12). On April 29, 1918, the findings of fact, conclusion of law, and opinion of the court were entered and filed and on the same day judgment was entered (Rec., p. 12). June 26, 1918, the appellant filed a motion for a new trial and amendment of findings (Rec., p. 16). This motion for new trial was based upon the report of the War Department of June 26, 1918, which was filed with the motion for a new trial as a part thereof. The second request for remand is based upon the matters contained in the report of the War Department accompanying the motion for new trial, which motion was overruled November 11, 1918 (Rec., p. 16). From this it will appear that no testimony or evidence was taken in the case after April 29, 1918, and that by the denial of appellant's motion for new trial no evidence could have been introduced in the case since April 16, 1918. The papers accompanying the motion for new trial, which was denied, are not evidence in the case and no finding of fact could be based upon facts not in evidence. If the lower court had granted appellant's motion and the case had been reopened for the taking of further evidence and the report of the War Department of June 26, 1918, had been in evidence, then the lower court could make a finding as to the facts

disclosed therein, but as the motion for new trial was denied and the report of the War Department aforesaid was not in evidence no finding could be based thereon. For these reasons the motion for remand for the second additional finding of fact should be denied.

The decision of the Court of Claims upon a motion by the United States for new trial, within its jurisdiction, is conclusive and not subject to review by this court.

Young *vs.* United States, 95 U. S., 641.

The appellant could not, therefore, by a motion for remand obtain a review of the decision of the Court of Claims on its motion for new trial made in this case. The decision of the lower court that the newly discovered evidence offered by appellant was immaterial, is conclusive and final, and such evidence is not and cannot be made a part of the record.

III.

The third requested additional finding raises the question of whether the military authorities of the United States retained continuous possession of appellee's land from July 1, 1900, to December 8, 1900. This fact already appears in the finding of fact made by the lower court. The fourth finding of fact reads in part as follows:

> "General Randall, an officer of the army of the United States commanding the United States troops in Alaska on or about July 1, 1900, without lawful authority, took possession of a tract of land in which was included the mining claim of the plaintiff. * * * At no time since General Randall took possession of said land has the plaintiff been able to operate its claim or to do any further mining work thereon. * * *" (Rec., p. 13).

There has not been, nor is there under the finding of facts as made by the Court of Claims, any question but that the

mining claim of appellee was occupied by General Randall, who was part of the military forces of the United States, from on or about July 1, 1900, to December 8, 1900. Nor has there been nor can there be any question raised under the finding of facts of the lower court but that General Randall, as part of the military forces of the United States, and those who succeeded him, have occupied appellee's mining claim from December 8, 1900, to date. The question presented to the lower court and decided by it was not whether the military forces of the United States had been in continuous possession of appellee's land from on or about July 1, 1900, to the date of the hearing, for this was and is conceded and clearly appears in the findings of the lower court. The question of importance in this case was whether the possession under General Randall's order was a lawful and authorized possession or whether it was an unlawful and unauthorized possession and hence tortuous and not the possession of the United States. The finding of the lower court is clear on this point also. The lower court specifically holds that General Randall acted without lawful authority and specifically holds that the property was "taken under authority of the President's order of December 8, 1900" (F. V., Rec., 13). There is no room for argument under the findings of fact as made by the lower court, as to when the unlawful possession commenced and as to when the lawful possession commenced. The third requested additional finding of fact adds nothing to the clearness of the lower court's findings of fact or the opinion rendered thereon. The holding of the lower court is clearly indicated, and there can be no doubt as to what its answer would be to the third requested finding. The only object that would be gained by an order remanding the case on the third requested additional finding would be a further delay. This court, appellant believes, will not remand a case to the lower court for additional findings when the only result of such remand is additional delay.

This case has been, as to time consumed in court proceed-

ings, a travesty upon justice. Appellee has been anxious to have an adjudication of its rights, but with its utmost efforts it has taken fourteen years from the time of the institution of its suit to finally secure a determination of its rights by this court. In justice, further delay should not be granted except upon the clearest and most convincing proof of the necessity thereof. This motion comes far from containing such proof. The lower court appreciated this fact and mildly commented thereon as follows:

> "The United States have been in possession of said tract of land, including the mining claim of the plaintiff, and have established thereon a military post, upon which they have erected buildings, and have taken and occupied said tract of land for more than seventeen years" (F. IV, Rec., 13).

It is this mild criticism of the action of the military authorities in retaining possession of appellee's land for a period of 17 years or more without making compensation therefor to which appellants object. This part of the finding of fact is not necessary and is merely cumulative. It could be entirely left out of the findings and still the findings would be full and complete. Nor do the appellants in their motion deny this fact, but admit on page 8 of their brief that all that they ask may be inferred from the fourth finding. That General Randall, one of the military authorities of the United States, retained continuous possession of the land located as a placer mining claim by the North American Transportation and Trading Company from July 1, 1900, to December 8, 1900, without lawful authority, is not an inference from the findings of fact, but is as clearly stated as being a fact as can be required of any court which makes findings of fact. Absolute clearness of expression is a rare gift, so rare indeed that but few opinions of courts or statements of facts made by them are not subject to hypercriticism. For this reason only such clearness of expression can be required as will convey to the reader the meaning of the writer. It is respect-

fully submitted that the lower court's findings of facts in this case meet any reasonable requirement for clearness and that there is nothing ambiguous or doubtful in them.

IV.

The appellant has not argued separately its three requests for additional findings of fact, and the reason for this is that the first and last requests would be without benefit unless the second request was granted. No evidence was introduced in the case showing any authority in General Randall to seize appellee's property in time of peace. Nor does appellant claim in its motion to this court or in its brief on such motion that any such evidence exists in the record.

Note the following appearing on page 11 of the motion to remand:

> "These facts are all contained in the newly discovered evidence filed in the Court of Claims in support of motion for a new trial, said evidence not having been known to the Attorney General or his assistants before the case was tried and due effort having been made before trial to obtain such evidence. Appellant is therefore, entitled to the findings of fact requested, * * *."

The first additional fact requested to be found would not be sufficient basis for an argument as to the authority of General Randall. The third additional fact, if found, as appellant requests, would not be sufficient, even though coupled with the first, for the basis of an argument shewing General Randall's authority. The second additional finding of fact is the only one upon which an argument as to the authority of General Randall could be based, and inasmuch as the second request for additional findings of fact must be denied because there is nothing in the record upon which it could rest, it is clear that the entire motion for remand should be denied.

V.

A motion for remand for additional findings of fact calls into question the decision of a court of record. The form and contents of a motion for remand upon which this court will act have not been specified by this court. The motion presented to this court by appellant is unverified. Unverified motions are apt to be inaccurate as is shown by the present motion. The date of the filing of the motion for new trial, which is an important date in this case, is given in the motion as January 26, 1918 (p. 6). The actual date of the filing of the motion for new trial was June 26, 1918 (Rec., p. 16).

In the statement accompanying the motion for remand (Motion for Remand, pp. 5-6), and which appellee assumes is to be considered as part of the motion in accordance with the rule of this court requiring motions to contain a statement of the facts, the following statement appears:

> "On September 3, 1900, General Randall wrote the Adjutant General, United States Army, Washington, D. C., recommending the issuance of an executive order setting apart a certain tract of land near the mouth of the Nome River, which included appellee's claim, 'upon which buildings for the permanent post are being erected.' "

On pages seven and eight of the motion for remand occurs the following language:

> "Appellant is, therefore, clearly entitled to a finding setting forth the fact that as early as September 3, 1900, General Randall, commanding the Department of Alaska advised the Adjutant General, and through him the Secretary of War, that the buildings for the permanent post were then being erected upon appellee's property."

The statement and the claim under the statement are inaccurate. No notice was sent the War Department that

General Randall was constructing buildings upon appellee's property. Notice was sent the War Department that buildings were being constructed upon a certain described piece of property, which as a matter of fact included appellee's property, but of this fact the War Department had no notice nor did the War Department have notice as to where on the large piece of property named in General Randall's letter the buildings were being erected.

Both of the above statements of fact are inaccurate and would not be apt to occur in a verified motion. There is no intention upon the part of appellee of suggesting that the inaccuracies above mentioned are due to any cause except a failure to carefully compare the completed motion with the facts and to suggest that if the motion had been verified that then these errors would not have appeared in the motion.

Will this court question the completeness and accuracy of the findings of fact of a court of record upon an unverified motion?

VI.

The appellant's application for an appeal to this court from the Court of Claims was allowed February 10, 1919 (Rec., p. 16). Service of the printer's proof of the motion for remand was made upon the appellee on the 11th day of February, 1920, or more than a year after the appeal to this court was allowed. This case is number 319 on the present calendar of the Supreme Court, and in the usual course will be called for argument on or about March 22, 1920. After the filing of appellant's request for an appeal appellee filed a request for an appeal, which was allowed (Rec., p. 16). Appellee's appeal is number 320 on the present calendar of this court and will be heard with appellant's appeal, number 319. Appellee's brief in both cases was in the hands of the printer at the time it was given notice of the motion for remand for additional findings of fact and was served and filed Feb. 21, 1920, in accordance with the rules of this court. To come within the rules of this court requiring

copies of its brief to be filed with the clerk of the court at least three weeks before the case is called for argument, appellee could not with safety file its briefs at a later date than Feb. 23, 1920. No cause for delay in presenting the motion for remand to this court is shown.

Will this court consider a motion for remand for additional findings of fact, when such motion is not filed or noticed prior to the time when under the rules of this court briefs in the case are required to be filed and served, or is the presentation of a motion for remand at so late a date so unseasonable, in the absence of cause shown, as to warrant its dismissal for failure to file within a reasonable time? It would seem as though a motion, the result of which is to delay the final hearing for a period of about two years, should be presented within a reasonable time after the right of presentation became existent, and in the absence of a showing excusing such delay that consideration of the motion should not be entertained.

VII.

Appellee, therefore, respectfully submits that for all of the foregoing reasons, the motion for remand to the Court of Claims for additional findings of fact should be denied.

ABRAM R. SERVEN,
BURT E. BARLOW,
Attorneys for Appellee.

In the Supreme Court of the United States.

OCTOBER TERM, 1919.

THE UNITED STATES, APPELLANT, v. THE NORTH AMERICAN TRANSPORTATION and Trading Company, appellee.	No. 319.
THE NORTH AMERICAN TRANSPORTATION and Trading Company, appellant, v. THE UNITED STATES, APPELLEE.	No. 320.

APPEALS FROM THE COURT OF CLAIMS.

BRIEF FOR THE UNITED STATES.

STATEMENT.

This suit was brought in the Court of Claims to recover the value of a certain placer mining claim and for compensation for the use and occupancy thereof by the United States. On July 1, 1899, the claimant discovered and duly located a placer gold mining claim on the public domain of the United States near the confluence of the Nome River and Bering Sea. During the years 1899 and 1900 the requisite assessment work was done and the claim

was surveyed for claimant by the United States deputy mineral surveyor.

On or about July 1, 1900, General Randall, United States Army, commanding the Department of Alaska, took possession of a tract of land, including the mining claim of claimant, as a site for an Army post. The claimant, being unable to withstand the authority of said officer, gave him possession of said mining claim, at the same time demanding compensation therefor, and this was promised by General Randall. General Randall then recommended to the Secretary of War that said tract be used as a site for an Army post. In accordance with the recommendation, on December 8, 1900, the President of the United States issued an order reserving from sale and setting aside for military purposes the tract of land in which was included claimant's property, stating that said land was reserved and set aside subject to any legal rights that might exist to any land within its limits. (Finding IV, R. p. 13.)

The tract of land so taken by the United States has been occupied and used as any Army post since possession was first taken, and the buildings that have been erected on said land are located on that portion of the tract which had been the placer claim of appellee. (Finding IV, R. p. 13.)

BRIEF OF ARGUMENT.

1. The claimant contends that the taking on July 1, 1900, when it was dispossessed by General Randall, was unlawful, tortious, giving it no right to recover

against the United States, but that by the issuance of the Executive order on December 8, 1900, its property was lawfully taken so that a right of action in the Court of Claims accrued to it on that day and not on July 1, 1900, and therefore its action begun in the Court of Claims December 7, 1906, is not barred by section 156 Judicial Code (R. S. 1069), which would be the case if its right of action accrued July 1, 1900. Claimant's contention in this respect was sustained by the Court of Claims and forms the subject of the Government's appeal.

2. Claimant further contends for an allowance (which can only be allowed as interest on the value of its claim as fixed by the Court of Claims) for the use and occupancy of its property by the Government from December 8, 1900. This claim was not allowed by the Court of Claims and is the subject of the cross-appeal by claimant.

The two questions will be discussed in their order.

ARGUMENT.

1. The taking by the Government was on July 1, 1900, and the action in the Court of Claims was barred by the statute.

Claimant's property consisted of a duly perfected mining claim located upon the public lands in Alaska. It therefore was entitled to and owned the present and exclusive *possession* of the lands located, even as against the United States. *Belk* v. *Meagher*, 104 U. S., 279, 283.

On July 1, 1900, it was forcibly deprived of this possession and has never regained it. It was dis-

possessed by an officer of the United States Army. The United States erected buildings on the land and used it as any Army post. About five months after the actual dispossession an Executive order was issued purporting to withdraw a tract of land, which included said mining claim, from the public domain. This order would be ineffectual in view of claimant's title; claimant could be dispossessed lawfully only by agreement or condemnation. There has been no condemnation, and any agreement as to sale is negatived by this suit. There was no more authority, in so far as claimant's rights are concerned, in the Executive order than there was in Gen. Randall's verbal order for claimant to vacate. Granting that it could elect to regard any taking by the Government as lawful, the taking—claimant's dispossession—occurred July 1, 1900, and its action then accrued, and it was required to commence its action within six years from that date.

Section 156 of the Judicial Code reads:

> Every claim against the United States cognizable by the Court of Claims shall be forever barred unless the petition setting forth a statement thereof is filed in the court or transmitted to it by the Secretary of the Senate or the Clerk of the House of Representatives, as provided by law, within six years after the claim first accrues: *Provided*, That the claims of married women, first accrued during marriage, of persons under the age of twenty-one years, first accrued during minority, and of idiots, lunatics, insane per-

> sons, and persons beyond the seas at the time the claim accrued, entitled to the claim, shall not be barred if the petition be filed in the court or transmitted, as aforesaid, within three years after the disability has ceased; but no other disability than those enumerated shall prevent any claim from being barred, nor shall any of the said disabilities operate cumulatively.

Claimant, however, aside from this action which it elected to bring, at all times since the moment it was deprived of possession, had an action to protect its property and the courts were open.

> *Meigs* v. *McClung's Lessee*, 9 Cranch 11.
> *Wilcox* v. *Jackson*, 13 Pet. 498.
> *Brown* v. *Huger*, 21 How. 305.
> *United States* v. *Lee*, 106 U. S. 196.
> *Scranton* v. *Wheeler*, 179 U. S. 141.

These cases show what right claimant had; it was the right not to be deprived of its property—in this case, possession—without just compensation; and its right of action, in any way it might choose to assert it, accrued at the time it was dispossessed. In only one way could this taking be lawful—by having compensation paid voluntarily or awarded by a court.

In effect, therefore, the court below has held that claimant's mining claim was legally taken by the Executive order of December 8, 1900. That, aside from said order, the occupation and possession by the military authorities was tortious.

This decision runs counter to the principle well established by this court that private property taken

for a public use can only be compensated for under the Constitution where the taking was authorized, either expressly or by necessary implication, by some act of Congress.

> If an officer of the United States assumes, by virtue alone of his office, and *without the authority of Congress*, to take such matters under his control, he will not, in any legal or constitutional sense, represent the United States, and what he does or omits to do, without the authority of Congress, can not create a claim against the Government "founded upon the Constitution." It would be a claim having its origin in a violation of the Constitution. The constitutional prohibition against taking private property for public use without just compensation is directed against the Government, and not against individual or public officers proceeding without the authority of legislative enactment. The taking of private property by an officer of the United States for public use, without being authorized, expressly or by necessary implication, to do so by some act of Congress, is not the act of the Government. (*Hooe* v. *United States*, 218 U. S., 322–336, at p. 335.

On March 3, 1899 (30 Stat., 1064, 1070, chap. 423), and on May 26, 1900 (31 Stat., 205, 213, chap. 586), several million dollars were appropriated for barracks and quarters for troops and for certain other specified purposes (see appendix). Under these acts, if at all, is to be found the legislative

authority or sanction for the taking of claimant's property so as to create a claim for just compensation under the Constitution. In *United States* v. *Great Falls Mfg. Co.* (112 U. S., 645, 656) this court held that—

> The taking of the improvements necessarily involves the taking of the property.

so as to entitle the owner thereof to just compensation. So, in this case, if the erection of barracks upon claimant's property by the military authorities, from moneys appropriated for such a purpose by Congress, and expended under the direction of the Secretary of War can possibly be held to necessarily involve the taking of claimant's property so as to create a claim against the United States, the taking occurred where claimant was actually dispossessed. Particularly as the court below has found that the barracks were erected upon that part of the tract withdrawn for a military reservation whereon the claim was located. (Finding IV, T. R., p. 13.)

In every case where private property has been appropriated under legislative authority for a public use, under such circumstances as to constitute a taking within the scope of the Fifth Amendment of the Constitution it has been held by this court that the appropriation dates from the time when actual physical possession was taken by the Government; that is to say in such cases where no condemnation proceedings are had but where the Government by the construction of public works deprives the owner

of the use and value of his property the proceeding is held to be an actual appropriation of the property, including the right of possession and the fee. (*United States* v. *Lynah*, 188 U. S., 445, 470; *United States* v. *Chandler-Dunbar Co.*, 229 U. S., 53, 76; *United States* v. *Cress*, 243 U. S., 316.)

While it is true that the amount awarded as compensation must be paid before final title passes, it is equally true that the ownership vests in the Government from the time of actual physical appropriation, and the courts have uniformly allowed the value of the property at the time of such appropriation and not at some later date when the court proceedings have been concluded.

In the Lynah case where a rice plantation was so flooded by the construction of a dam in the Savannah River as to substantially destroy the property, the Circuit Court of the United States for the district of South Carolina determined the value of the plantation at the time it was flooded and rendered judgment for said value. So also in the case of *United States* v. *Cress*, *supra*, the Court of Claims determined the value of the property that was appropriated at the time of its appropriation.

Neither the Court of Claims nor the claimant has shown any legislative authority for the taking of appellant's property by Executive order. As a matter of fact, the Executive order withdrawing from entry the tract of land which included claimant's property merely withdrew what the United States

then owned. It did not seek to appropriate any legal rights to any land already acquired by private individuals." (T. R. p. 10.) If, therefore, the appropriation of this land by the military authorities for a public use on July 1, 1900, was tortious, there has never been any taking which would create a claim against the United States "founded upon the Constitution;" on the contrary, it would be a claim (as this court has stated in the Hooe case) having its origin in a violation of the Constitution. It necessarily follows that if the possession taken by General Randall was unlawful, that taken by the Executive was equally so, and the taking being tortious, the petition in the Court of Claims must be dismissed. *United States* v. *Lee*, 106 U. S. 196, 221.

If, on the other hand, the erection of public works upon the property under the authorization of Congress constitutes a lawful taking for which just compensation, under the Constitution, can be recovered, such taking must date from July 1, 1900 (from which time claimant was deprived of the use of its property), and the action is barred by the statute of limitations.

2. Damages for the use and occupation of the property.

In its cross appeal, No. 320, claimant contends that the court below erred in not allowing additional compensation because it was deprived of the use and occupation of its property between December 8, 1900, the date of the Executive order withdrawing the land

from entry, and April 29, 1918, the date of the rendition of judgment by the Court of Claims.

In no case where private property has been appropriated by the construction of public works upon it, where the appropriation has been found to be a complete and permanent one, has there been any award or allowance or judgment for the use and occupation of the property by the Government pending the payment of just compensation. This is so, because the ownership, if the taking is lawful, vests in the Government as soon as physical possession is had, although the title may not be complete until compensation is paid the owner. Any additional allowance for use and occupation until the money awarded be actually paid over, would be in the nature of interest, which the Court of Claims is forbidden by law to allow unless it be stipulated for by contract, or authorized by statute.

In *United States* v. *North Carolina* (136 U. S., 211, 216), this court said:

> Interest, when not stipulated for by contract, or authorized by statute, is allowed by the courts as damages for the detention of money or of property, or of compensation, to which the plaintiff is entitled, and, as has been settled on grounds of public convenience, is not to be awarded against a sovereign government, unless its consent to pay interest has been manifested by an act of its legislature, or by a lawful contract of its executive officers. *United States* v. *Sherman*, 98 U. S.,

565; *Angarica* v. *Bayard*, 127 U. S., 251, 260, and authorities there collected; in re Gosman, 17 Ch. D. 771.

Congress has declared (Judicial Code, sec. 177; sec. 1069, R. S.) that—

> No interest shall be allowed on any claim up to the time of the rendition of judgment thereon by the Court of Claims, unless upon a contract expressly stipulating for the payment of interest.

This law in terms prohibits the Court of Claims from allowing interest; the exception incorporated must be considered the only exception.

The cases in the State courts, cited by counsel in support of his contention, are not applicable, first, because they are not claims against the United States which are controlled by a special statute; and, second, because they are cases where property was taken under condemnation proceedings.

In *Sweet* v. *Rechel*, 159 U. S., 380, 407, it was decided by this court that where lands were taken by the city of Boston pursuant to the provisions of a State law, that the title vested in the city at least from the time it filed in the office of the registry of deeds a description of the lands so taken and that from that time the owner of the property became absolutely entitled to reasonable compensation, the amount to be ascertained without undue delay. See also *Bauman* v. *Ross*, 167 U. S., 548, 598.

Moreover, as already stated, where property is appropriated by the Government under the express or implied authority of Congress, for a public use, this court has uniformly found just compensation to be the value of the property at the time of its taking, and has in no instance allowed any interest or any additional award for the use and occupation of the property between the time it was taken and the time of the payment of the award. (*United States* v. *Lynah*, 188 U. S., 445, and other cases cited above.)

Assuming that plaintiff's cause of action did not accrue untii December 8, 1900, its petition was not filed until December 7, 1906, its evidence was not closed until October 31, 1917, almost 11 years later. Defendant's evidence was closed upon the same day, it having been taken during the summer and fall of 1917, immediately after the claimant had completed his prima facie case. Claimant's brief was then filed February 6, 1918, defendant's on March 22, 1918; claimant's reply brief on April 16, 1918, upon which date the case was argued and submitted in the court below.

The history of the court proceedings is given here because of the statement in claimant's brief on appellant's motion to remand for additional findings of fact:

> This case has been, as to time consumed in court proceedings, a travesty upon justice. Appellee has been anxious to have an adjudication of its rights, but with its utmost efforts

it has taken 14 years from the time of the institution of its suit to finally secure a determination of its rights by this court.

The decision of the lower court should be reversed and the petition dismissed.

Respectfully submitted.

ALEX. C. KING,
Solicitor General.
FRANK DAVIS, JR.,
Assistant Attorney General.

R. P. WHITELEY,
Attorney.

APPENDIX.

[Act of Mar. 3, 1898 (30 Stat., 1064, 1070, chap. 423).]

An act making appropriation for the support of the Regular and Volunteer Army for the fiscal year ending June thirtieth, nineteen hundred.

Be it enacted, etc. * * *

Barracks and quarters: For barracks and quarters for troops, storehouses for the safe-keeping of military stores, for offices, recruiting stations, and for the hire of buildings and grounds for summer cantonments, and for temporary buildings at frontier stations, for the construction of temporary buildings and stables, and for repairing public buildings at established posts, including the extra-duty pay of enlisted men employed on the same: *Provided*, That no part of the moneys so appropriated shall be paid for commutation of fuel and for quarters to officers or enlisted men, three million dollars.

[Act of May 26, 1900 (31 Stat., 205, 213, chap. 586).]

An act making appropriation for the support of the Regular and Volunteer Army for the fiscal year ending June thirtieth, nineteen hundred and one.

Be it enacted, etc. * * *

Barracks and quarters: For barracks and quarters for troops, storehouses for the safe-keeping of military stores, for offices, recruiting stations, and for the hire of buildings and grounds for summer cantonments, and for temporary buildings at frontier stations, for the construction of temporary buildings and

stables, and for repairing public buildings at established posts, including the extra-duty pay of enlisted men employed on the same, three million dollars: *Provided*, That no part of the moneys so appropriated shall be paid for commutation of fuel or for quarters to officers or enlisted men.

○

TABLE OF CONTENTS.

ARGUMENT.

Table of Cases.

Table of Statutes.

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1919.

No. 319.

THE UNITED STATES, APPELLANT,

vs.

THE NORTH AMERICAN TRANSPORTATION AND TRADING COMPANY, APPELLEE.

No. 320.

THE NORTH AMERICAN TRANSPORTATION AND TRADING COMPANY, APPELLANT,

vs.

THE UNITED STATES, APPELLEE.

APPEALS FROM THE COURT OF CLAIMS.

BRIEF FOR THE NORTH AMERICAN TRANSPORTATION AND TRADING COMPANY, APPELLEE IN No. 319 AND APPELLANT IN No. 320.

STATEMENT OF FACTS.

This case comes before this court upon appeal and cross-appeal from a judgment in the Court of Claims in favor of cross appellant for $23,800.00, being the value of an interest

in real estate appropriated by the United States as of the date of the appropriation, which was December 8, 1900.

On July 1, 1900, the cross-appellant was the owner of a valid placer mining claim (F. 2, Rec., p. 12) of about 15½ acres located near Nome, Alaska, more specifically described in paragraph two of cross-appellant's petition (Rec., p. 7). The reasonable value of cross-appellant's 15½-acre claim was, on December 8, 1900, $23,800.00 (F. 5, Rec., p. 12).

July 1, 1900, or thereabouts, General Randall, without authority (F. 4, Rec., p. 13), seized cross-appellant's 15½-acre mining claim and prevented the further occupation thereof by cross-appellant. This officer thereafter recommended to the Secretary of War that this land of cross-appellant, together with other land, be taken for public use as a site for military purposes (F. 4, Rec., p. 13). This recommendation was followed December 8, 1900, by a Presidential order setting aside cross-appellant's 15½-acre tract with other land for military purposes, subject, however, to any existing legal rights, and this was followed by an order of the Secretary of War on December 20, 1900, appropriating said lands for military purposes, subject to existing rights.

The United States have since December 8, 1900, occupied the 15½-acre tract of cross-appellant's, to the exclusion of cross-appellant, without making compensation therefor (F. 4, Rec., p. 13).

The cross-appellant waived its right to condemnation proceedings as a condition precedent or subsequent to seizure, and brought its suit upon the implied promise of the defendant to make just compensation for the property taken for public use December 7, 1906.

The Court of Claims gave judgment for the value of the property as of the date of the appropriation under the order of the President and declined to include in cross-appellant's compensation any sum for the use of the property from the date of the authorized seizure to the date of the judgment.

Cross-appellant claims that the just compensation to which

it is entitled for the taking of its property is the value of the property seized, presently paid, and in default of payment within a reasonable time, then in addition to the value of the property a sum representing the use of the property until judgment entered either in condemnation proceedings or in assumpsit on implied contract.

The defendant claimed that just compensation for the taking of property for public use is the value of the property taken as of the date of the taking, and that pending the payment of the value of the property the cross-appellant is entitled to no compensation for the use and occupancy of the property, no matter whether delay in payment covers one year or twenty years, as in this case, or any number of years.

The presidential order was issued December 8, 1900, and suit was instituted December 7, 1906, or within six years from the time of the authorized taking of the property.

The cross-appellant claims that it had no action against the United States for the tortuous acts of its agents, and that no right of action accrued until the taking of the property under the presidential order.

The defendants claim that the statute of limitations commenced to run at the time of the unauthorized and tortuous seizure of the property by General Randall, on or about July 1, 1900, and hence the action was barred at the time suit was instituted.

ASSIGNMENT OF ERRORS.

1. The lower court erred in holding that just compensation was made to cross-appellant by compensating it for the value of its property at the time it was taken for public use.

2. The lower court erred in denying cross-appellant's claim for just compensation for the use of its property from the time it was taken for public use up to the time the just compensation to which it was entitled was determined.

3. The lower court erred in not including in its judgment a sum for the use and occupation of cross-appellant's property seized for public use from the date of such seizure to the date of judgment.

ARGUMENT.

Just compensation includes damages for the value of the property at the time of the taking and also when the owner of the property is deprived of the use and occupation thereof, damages for such deprivation.

The duly recorded mining claim of defendant entitled it to possession, occupation, and beneficial use of the land included therein against every one, including the United States.

Belk *vs.* Meagher, 104 U. S., 279.
Gwillim *vs.* Donnellan, 115 U. S., 45-49.
St. Louis Mining Co. *vs.* Montana Mining Co., 171 U. S., 650-655.

Under the Presidential order of December 8, 1900, and the order of the Secretary of War of December 20, 1900, the property of cross-appellant was lawfully seized by the United States Government for public use, subject to a reasonably prompt payment of just compensation.

Joint resolution of April 11, 1898, 30 Stat. L., 737.
Act of August 18, 1890, 26 Stat. L., 316.
Act of June 6, 1900, 31 Stat. L., 588-623.

The property of cross-appellant could not be taken for public use without payment of just compensation under the fifth Amendment of the Constitution of the United States, and on failure upon the part of defendants to condemn the land so taken the cross-appellant could (if public policy did not prevent) bring an action of ejectment against the agents of the Government or could waive its right to condemnation

proceedings and sue upon the implied promise of the defendants to pay just compensation.

United States *vs.* Great Falls Manufacturing Co., 112 U. S., 645.
United States *vs.* Archer, 241 U. S., 119.
United States *vs.* Lynah, 188 U. S., 445-474.

In the last case the court held as follows:

> "Therefore, following the settled law of this court, we hold that there has been a taking of the lands for public uses, and that the government is under an implied contract to make just compensation therefor."

The cross-appellant was the beneficial owner of the land seized for public use on or about December 8, 1900, and has been deprived of its property therein and the use and occupation of such property from the date of seizure and has received no compensation therefor whatever. The only question presented to this court for its consideration is, what is the just compensation to which cross-appellant is entitled?

But few cases of this character come before the courts for determination. Almost without exception, when private property is taken for public use the possession of the property remains with the owner until payment by the proper officer of the Government of the value of the property. Under these circumstances the value of the property represents the just compensation to which the owner is entitled. Private property can, however, be lawfully taken for public use prior to the payment of just compensation, and in these cases it is apparent that just compensation would not be made by payment of the value of the property as of the date of seizure. In order that the payment may be just compensation it must be made promptly and not be deferred for any length of time. One of the leading cases upon this question which has been cited with approval many times is the case of

Bloodgood *vs.* M. & H. R. R. Co., 18 Wend. (N. Y.), 9-35-44:

> "But private property shall not be taken without *just compensation.* There can be no diversity of opinion as to the meaning of the words *just compensation.* It is a fair equivalent in money, a *quid pro quo;* it is a recompense in value for the property taken. When the compensation is to be made, may perhaps be a matter of doubt; whether before the property is taken or used, or afterwards. It must either be paid before the property is taken, or within a reasonable time thereafter; and the making of this compensation must be as absolutely certain, as that the property is taken; it must not be dependent on any hazard, casualty or contingency whatever. This I understand to be the spirit of our legislation hitherto, on subjects of this character."

If the owner is deprived of the use and occupation of the property prior to the payment of the value thereof he is entitled to a sum for the use and occupation of the property pending payment in addition to the value of the property. This principle has been recognized by this court in the case of

Shoemaker vs. United States, 147 U. S., 282-320-321:

> "The fourteenth assignment charges the court with error in refusing to allow interest on the amounts assessed as the values for lands selected for the Rock Creek Park. The argument shows that the interest claimed was for the time that elapsed between the initiation of the proceedings and the payment of the money into court. The vice of this contention is in the assumption that the lands were actually condemned and withdrawn from the possession of their owners by the mere filing of the map. Interest accrues either by agreement of the debtor to allow it for the use of money, or, in the nature of damages, by reason of the failure of the debtor to pay the principal when due. Of course, neither ground for such a demand can be found in the present case. No agreement to pay the interest demanded is pointed to, and no failure to pay the amount assessed took place. That amount was not fixed and ascertained

till the confirmation of the report. Then some of those entitled to the assessment accepted their money, the plaintiffs in error declined to accept, and the amounts assessed in their favor were paid into court, which must be deemed equivalent to payment.

"It is true that, by the institution of proceedings to condemn the possession and enjoyment by the owner are to some extent interfered with. He can put no permanent improvements on the land, nor sell it, except subject to the condemnation proceedings. But the owner was in receipt of the rents, issues, and profits during the time occupied in fixing the amount to which he was entitled, and the inconveniences to which he was subjected by the delay are presumed to be considered and allowed for in fixing the amount of the compensation. Such is the rule laid down in the cases of the highest authority. Reid *vs.* Hanover Branch R. Co., 105 Mass., 303; Kidder *vs.* Oxford, 116 Mass., 165; Hamersley *vs.* New York City, 56 N. Y., 533; Norris *vs.* Philadelphia, 70 Pa. St., 332; Chicago *vs.* Palmer, 93 Ill., 125; Phillips *vs.* South Park Comm'rs, 119 Ill., 626."

The cases cited with approval by this court are all to the same effect; namely, that when the owner of property is deprived of the use and occupation of the property then the owner is entitled to interest upon the value of the property as compensation for the deprivation of the use and occupation thereof.

In Phillips *vs.* South Park Comm'rs, 119 Ill., 626-645, cited with approval in the above-quoted decision, the court holds:

"When, therefore, the possession of the land is taken, the compensation is due; and if due, and payable, it, in justice, ought to draw interest from that time. Here, the South Park Commissioners went into the possession of the land on the 27th day of August, 1870, and they have had the use of the property ever since. They have also had the use of the money which represents the property, although it was due to the owner when they took possession. It is neither

> equitable nor right that they should have the use of the land and of the money; but as they have had the land, and withheld the payment of the money, they should be required to pay interest thereon, as ruled in the circuit court. Shelden *vs.* Jones, 6 Rand., 465; Delaware Railroad Co. *vs.* Bronson, 61 Pa. St., 369; Railroad Co. *vs.* Gesner, 20 Pa., 240."

It is believed, no cases can be found where interest has not been allowed upon the value of the property from the time when the property was seized by the public. The justice of the rule requiring compensation to be made in addition to the actual value of the property at the time of seizure for the use and occupation of the property up to the time of payment cannot be questioned and no authorities will be found which deny this right. The difficulty lies not in the determination of what is just compensation but in the description of the elements which are to be included in just compensation. In almost all of the cases coming before the courts for determination it made no difference whether the court in determining what just compensation was, called part of such sum interest and part of such sum principal or whether it called part of such sum compensation for use and occupation, and part, the value of the property at the time of the seizure. In the present case, however, the distinction between interest and damages for loss of use and occupation was deemed by the lower court to be material, and it would not allow anything for loss of use and occupation, because it considered such damages interest and hence barred by the statute.

The sum allowed for the use and occupation is not interest, and this is clearly illustrated by the case of

Klages *vs.* Terminal Co., 160 Pa. St., 386-389-390.

In this case the property was taken before payment was made, and the owner of the property claimed compensation for use and occupation equalling the interest on the money value of the property. The legal rate of interest was 6 per

cent. The evidence disclosed the fact that the property was rented for an amount equalling 4 per cent on the money value. The court determined that it was the rental value of the property that the owner could receive and not interest. There was also involved in the case a Pennsylvania statute which prevented the recovery of interest on unliquidated demands, and as to this branch of the case the court held that the sum allowed for the use and occupation was not interest and was not barred by the statute. The following quotation from the opinion of the court is directly in point:

> "Unliquidated damages do not fall within the meaning of the words 'the loan or use of money,' and for that reason no interest is demandable upon them. They must be first liquidated by the action of the parties or by a recovery at law. Plymouth Township *vs.* Graver, 125 Pa., 24; Emerson *vs.* Schoonmaker, 135 Pa., 437. The same rule applies to damages recoverable in condemnation proceedings. The constitution requires corporations exercising the right of eminent domain to 'make just compensation for property taken, injured or destroyed, by the construction or enlargement of their works, highways or improvements.' * * * It is true that damages are to be estimated as of the date of the entry, because an estimate as of any other date might do injustice to one or the other of the parties, but until the calculation is actually made there is no sum that the landowner has a right to demand, or that the corporation could tender. The lapse of time between the exercise of the right of eminent domain, and the adjustment of the damages inflicted by it, is one of the elements to be taken into consideration in making up the award or verdict. The compensation must be a just one at the time its amount is settled, and what is just between the parties must depend upon the circumstances peculiar to each case. * * * Interest as interest has no place in the computation of damages. The question for a jury in every case is what sum will make a just compensation to the landowner for the entry and appropriation by the corporation?"

The same distinction has been made by other courts whenever they have been careful to distinguish between the best evidence as to the amount to be allowed for use and occupation (interest in most cases) and damages for use and occupation. It is, of course, true that where property is not rented but is in the possession of the owner that it would be difficult, if not impossible, to arrive at a fair estimate of the damages sustained by reason of deprivation of use and occupation except by estimating the value of the property and then saying that the rental value should be measured, in the absence of better evidence, by the legal interest on the estimated value. As in practically all of the cases coming before the courts the property taken has been in the possession of the owner, it is not surprising that the courts have used the word "interest," which is the measure of the damages, instead of the words "damages for loss of use and occupation amounting to a certain amount," without reciting the evidence (interest) upon which the sum so found as due is based.

In the case of Cohen *vs.* St. L., Ft. S. & W. R. R. Co., 34 Kan., 158-168, the court recognized this distinction in the following language:

> "The third and last question raised by the plaintiff is as follows: Where a railroad company has taken actual possession of another's property for a right-of-way, and has continued in such possession, may interest or damages in the nature of interest be allowed upon the amount of damages sustained from the time the railroad company first took possession of the property up to the time of the trial? We think this question must be answered in the affirmative."

In the case of Irrigation Co. *vs.* McClain Co., 69 Kan., 334-341-342, the court recognized this distinction in the following language:

> "In condemnation appeals the issue is, What shall be full compensation? Interest is allowed merely as a means of securing such compensation. If, upon

> the condemnation of land, complete deprivation do not follow at once, still, further tenure is rendered precarious. Possession may be disturbed at any time, and all property rights are exercisable only under doubt and uncertainty as to their duration. As a recompense for the loss attending this embarrassed use of the land and this qualification of dominion over it pending the payment of the condemnation money, interest may be allowed. If, however, as a matter of fact the owner should suffer no injury in these respects no occasion for compensation by way of interest would arise. The owner should not have his land and interest too, for the constitution does not contemplate the payment of anything beyond full compensation. It is the better rule, therefore, to allow interest on general damages from the date of condemnation, then reduce the amount by the value, if any, to the owner of whatever subsequent possession and use of the land he has enjoyed."

In the case of Moll *ex.* Sanitary Dist., 131 Ill. App., 155-160, the court recognized this distinction in the following language:

> "The Eminent Domain Act provides that the just compensation for property taken or damaged for public use shall be ascertained and assessed by a jury, as therein provided.
>
> "The oath administered to the jury in a proceeding under that act is, that they will 'well and truly ascertain and report just compensation to the owner and each owner of the property which is sought to be taken or damaged, according to the facts in the case as the same may be made to appear from the evidence.' Neither an amendment to the petition nor a cross petition was necessary to authorize the jury to include, as a part of Moll's compensation, an allowance for the use of his land from the time the petitioner took possession thereof until the trial. The order giving the petitioner the right to take possession of Moll's land upon depositing the amount of the first judgment and giving a bond, was an order

> entered in the condemnation proceeding of which the court in which said proceeding was pending took judicial notice."

The above case was affirmed by the highest court of the State of Illinois.

In the case of Moll *vs.* Sanitary Dist., 228 Ill., 633-636, the court recognizing the distinction between interest as a measure of damages and damages for use and occupation in the following language:

> "In this case an unusual delay occurred on account of the appeal. The trial occurred with reasonable promptness, and if the damages had then been properly assessed and paid the plaintiff would have received promptly just compensation. But in order to secure a fair and legal assessment he was compelled to appeal, and in the meantime the petitioner took possession of his property and held it for three years. Thus, when the cause came on to be tried after the determination of the appeal, there was an additional element of damages which was not included in the first trial—the deprivation of the use of the plaintiff's property during the pendency of his appeal. Not only was his property taken, but for three years he was deprived of its use. The jury were empaneled, not to assess the value of the property taken or damaged, but, in the language of the oath required by the statute to be administered, 'to well and truly ascertain and report just compensation to the owner of the property which it is sought to take or damage, * * * according to the facts in the case as the same may be made to appear by the evidence.' This just compensation, according to the facts in this case, included not only the value of the property at the time of the filing of the petition, but the use of the property from the time the petitioner took possession, measured by the interest for that time on the value of the property as found by the jury."

The same distinction was recognized in the case of Atlantic & Gt. W. Ry. Co. *vs.* Koblentz, 21 Ohio St., 334-338:

> "Welch, C. J. We see no error in these proceedings. Where private property is taken by the public for its use, the constitution guarantees to the owner a full compensation. To take the property, and deposit the compensation in the hands of a public officer, where the owner cannot reach it, is to deprive the owner of the use of his property, without giving him the use of the compensation. It is, to take from him the use of his property without any compensation. In the light of this constitutional provision, the real parties to the transaction are the public on the one hand, and the owner of the property on the other. By its laws the public has authorized the corporation, as its agent, to take the property, and has provided that the compensation shall be withheld, in the hands of one of its own officers, after the property is taken. This, of course, necessitates a loss to someone, of the interest on that compensation. It is not just that the loss should be cast upon the owner. The law by which the loss is occasioned is no act of his, but an act of the public, and he has no power to repeal or modify it, so as to avoid the loss. He is compelled to be passive, and can only insist, as he does in this case, that compensation for his property taken by the public, shall either be paid at the time it is taken, or paid with interest, or with a fair allowance for the use of the property during the time it is withheld."

To the same effect is the case of Sioux City R. R. Co. *vs.* Brown, 13 Neb., 317-319, where the court holds as follows:

> "By our constitution (Sec. 21 of Bill of Rights) it is declared that, 'The property of no person shall be taken or damaged for public use, without just compensation therefor.' Where, as in this case, an entire tract or lot of land is taken, 'just compensation' doubtless means, that the owner shall have its fair market value at the time of the taking or condemnation. Pierce Railroads, 210. But can it with reason be said that he has this when, during the de-

> lay incident to an appeal, he is deprived both of the use of his property and of its value? We think not. * * * It is true as claimed by counsel for the plaintiff in error, that there is a hardship in requiring the payment of interest on the whole amount of the condemnation money when, during the time for which it is computed, a large portion thereof has been lying idle in the custody of the law. But it would be a hardship also to deprive the owner of the property of its use during the same time without compensation therefor; and besides it would be a flagrant violation of his constitutional right to a 'just compensation.'"

The reasoning in all of these cases is the same; they all hold, and rightly hold, that an owner should not be deprived of the use and occupation of his property and also of the fair market value of the property, and that until the purchase price is paid and the title passes the owner is entitled to damages for the deprivation of the use and occupation of his property. This is not interest upon the value of the property, but is compensation for use and occupation, and may be either less or more than interest, as the facts in each case show. Where proof of the rental value of similar property is difficult or impossible to obtain or not satisfactory in character then, beyond doubt, the measure of the damages for use and occupation should be the interest upon the fair value of the property at the time taken. And as evidence of rental value is necessarily uncertain in most, if not all, cases it may be said that as a general rule the damages allowed should be measured by the interest on the value of the property, subject, however, to increase or decrease in case the particular facts prove it to be an exception to the general rule.

The title to the property taken for the use of the public does not pass to the public until the amount determined to be the just compensation is paid.

> "Of course, it results from this that the proceeding must be regarded as an actual appropriation of the

> land, including the possession, the right of possession and the fee; and when the amount awarded as compensation is paid, the title, the fee with whatever rights may attach thereto—in this case those at least which belong to a riparian proprietor—pass to the Government and it becomes henceforth the full owner."
>
> United States *vs.* Lynah, *supra*, p. 470.

Of course, until the title to the land passes to the Government the right to use and occupation remains in the owner, and damages for the deprivation thereof form part of the just compensation to which the owner is entitled.

That the owner should either have the use and occupation of his property or compensation for the deprivation of such use and occupation is clearly just, and it is to be doubted whether the question is, as a matter of fact, an open one in this court.

In the case of the United States *vs.* Great Falls Manufacturing Co. (*supra*), page 646, the judgment of the lower court, which was affirmed by this court, was:

> "For the sum of $15,692.00 as compensation for all past and future use and occupation by the United States of certain land."

This would seem to be a clear enunciation by this court of the rule that where property is occupied by the public prior to the payment of just compensation, then the judgment representing such just compensation shall include recompense for the past use and occupation. The form of judgment approved by this court in the Great Falls case would seem to clearly entitle the cross-appellant to damages for past use and occupation of the property taken at the time of the determination of the amount due.

This is not a suit for the value of the property taken at the date of the taking. Nor is it a suit for the use and occupation of the property from the date of the taking to the date of the determination of just compensation. Nor is it a suit for

interest upon any sum of money whatsoever. It is a suit for just compensation for the taking of property. The value of the property at the time of the taking and a reasonable sum for use and occupation pending the determination of the amount due are but elements in determining what such just compensation shall be. Nor are these elements divisible, for appellant could not sue for the use and occupation of the property separate from a suit for just compensation.

Moll *vs.* Sanitary Dist. (*supra*), 131 Ill. App., 155-160; 228 Ill., 636-637-638.

The lower court found the value of the property as of the date of the taking, but did not include in its judgment for just compensation any sum for the use and occupation of the property from the date of the taking to the date of the determination of the amount due. In this the court erred and its judgment should be modified by adding thereto a sum representing the use and occupation of the property from December 8, 1900, to the date of the determination of just compensation by this court. As this amount in this case can be measured by the interest on the value of the property during such period, there would seem to be no necessity for a remand to the lower court for further consideration of the case except for entry of judgment.

II.

Cross-Appellant's Right of Action Accrued December 8, 1900.

"But the United States have not consented to be liable to suits founded, in tort, for wrongs done by their officers, though in the discharge of their official duties."

Belnap *vs.* Schild, 161 U. S., 10-17.

"Neither the Secretary of War nor the Attorney General, nor any subordinate of either has been authorized to waive the exemption of the United States

from judicial process or to submit the United States or their property to the jurisdiction of the court in a suit brought against their officers."

Stanley *vs.* Schwaldy, 162 U. S., 255-270.

The rule that the United States Government is not responsible for the tortuous acts of its officers and that the tortuous acts of its officers cannot be waived by other officers, but can only be waived by direct and explicit action of Congress, is so well established as to require no further citations of authority.

The action of the officer of the United States in dispossessing cross-appellant of its property was without authority and was tortuous, and the cross-appellant had no action against the United States for damages resulting therefrom, nor does it make any claim against the United States for the unlawful seizure by its officer. No lawful seizure of the property was made until the presidential order of December 8, 1900, and the order of the Secretary of War of December 20, 1900. Neither of these officers could have adopted or ratified the tortuous act of the officer who seized without lawful authority, if they had so desired to do, but it is to be noted that neither the presidential order nor the order of the Secretary of War is retrospective in character, but operates only from the date of issue. If no other evidence had been introduced in the lower court these orders of themselves would show that the action of the inferior officer was without authority and tortuous and that no liability attached to the United States therefor. It therefore follows that no right of action accrued to cross-appellant until at the earliest December 8, 1900.

Respectfully submitted,

ABRAM R. SERVEN,
BURT E. BARLOW,
Attorneys for the North American Transportation and Trading Company.

APPENDIX.

Act of August 18, 1890, 26 St. L., 316.

"For the procurement of land, or right pertaining thereto, needed for the site, location, construction, or prosecution of works, for fortifications and coast defenses, five hundred thousand dollars, or so much thereof as may be necessary, and hereafter the Secretary of War may cause proceedings to be instituted, in the name of the United States, in any court having jurisdiction of such proceedings, for the acquirement, by condemnation, of any land, or right pertaining thereto, needed for the site, location, construction, or prosecution of works for fortifications and coast defenses, such proceedings to be prosecuted in accordance with the laws relating to suits for the condemnation of property of the States wherein the proceedings may be instituted: *Provided*, That when the owner of such land or rights pertaining thereto shall fix a price for the same, which, in the opinion of the Secretary of War, shall be reasonable, he may purchase the same at such price without further delay: *Provided further*, That the Secretary of War is hereby authorized to accept on behalf of the United States donations of lands or rights pertaining thereto required for the above-mentioned purposes: *And provided further*, That nothing herein contained shall be construed to authorize an expenditure, or to involve the Government in any contract or contracts for the future payment of money, in excess of the sums appropriated therefor."

Act of June 6, 1900, 31 Stat. L., 588-623.

Military Posts.

"For the construction of buildings at, and the enlargement of, such military posts as in the judgment of the Secretary of War may be necessary, and for the erection of barracks

and quarters for the artillery in connection with the adopted project for seacoast defense, and for the purchase of suitable building sites for said barracks and quarters, one million dollars. * * *"

Joint Resolution of April 11, 1898, 30 St. L., 737.

"Resolved by the Senate and House of Representatives of the United States of America in Congress assembled, That in case of emergency when, in the opinion of the President, the immediate erection of any temporary fort or fortification is deemed important and urgent, such temporary fort or fortification may be constructed upon the written consent of the owner of the land upon which such work is to be placed; and the requirements of section three hundred and fifty-five of the Revised Statutes shall not be applicable in such cases."

UNITED STATES *v.* NORTH AMERICAN TRANSPORTATION & TRADING COMPANY.

NORTH AMERICAN TRANSPORTATION & TRADING COMPANY *v.* UNITED STATES.

APPEALS FROM THE COURT OF CLAIMS.

Nos. 319, 320. Argued April 30, 1920.—Decided June 1, 1920.

When the Government without condemnation proceedings appropriates with legislative authority private property for a public use, it impliedly promises to pay therefor, but in order that the Government be liable it must appear that the officer taking possession of the property is authorized so to do by Congress or by the official on whom Congress conferred the power. P. 333.

The Acts of March 3, 1899, c. 423, 30 Stat. 1064, 1070, and of May 26, 1900, c. 586, 31 Stat. 205, 213, making appropriations for quarters for troops, sufficiently authorize the Secretary of War to take land for this purpose, but vest no authority in a general commanding a department. *Held*, that the action of the general in taking possession of the land was tortious and no liability on the part of the Government was created until the action was approved by the

Secretary of War, and since this approval occurred within six years before the commencement of this suit the suit was not barred by § 156 of the Judicial Code. P. 333.

The President's order reserving a tract largely public land, "subject to any legal rights which may exist to any land within its limits" did not mean that private land actually occupied for a public use was not taken, but merely that the right to compensation was recognized, and, in any event, the continued occupation of the private land and the erection of buildings thereon was such an appropriation as would give rise to a cause of action against the Government. P. 334.

The right to bring a suit against the United States in the Court of Claims for private property taken for a public purpose without condemnation proceedings is not founded on the Fifth Amendment but on the existence of an implied contract to pay the value of the property as of the date of the taking, and interest may not be added, because of § 177 of the Judicial Code. P. 335.

While interest might be allowed in condemnation proceedings instituted by the United States against the owner of property taken for a public purpose, as compensation for the use and occupation of the land prior to the passage of the title, it cannot be recovered in a suit in the Court of Claims against the United States. P. 336.

53 Ct. Clms. 424, affirmed.

THE case is stated in the opinion.

Mr. Assistant Attorney General Davis, with whom *The Solicitor General* and *Mr. R. P. Whiteley* were on the brief, for the United States.

Mr. Burt E. Barlow, with whom *Mr. Abram R. Serven* was on the brief, for the North American Transportation & Trading Co.

MR. JUSTICE BRANDEIS delivered the opinion of the court.

This suit was brought by the North American Transportation and Trading Company in the Court of Claims on December 7, 1906. The petitioner seeks to recover the

value of a placer mining claim situated on the public land near Nome, Alaska, which is alleged to have been taken by the Government on December 8, 1900, and also compensation for use and occupation thereof after that date. Ownership of the property by the company and the physical taking and continued possession of it by the Government were not controverted. The lower court found, also, that about July 1, 1900, General Randall, United States Army, commanding the Department of Alaska, took possession, as a site for an army post, of a large tract of public land which included the mining claim. The company yielded possession of the part occupied by it, being unable to withstand his authority; but at the same time it demanded compensation which General Randall promised would be paid. Use of the site for an army post was thereafter recommended by him to the Secretary of War. Pursuant to this recommendation, the President issued on December 8, 1900, an order by which the tract was reserved from sale and set aside for military purposes; and on December 20, 1900, the Secretary of War announced it as a public reservation, for the present under the control of the War Department. The tract has been used as an army post continuously since possession was first taken by General Randall. The buildings erected thereon are situated on that portion of the land which had been the company's placer claim; so that at no time since General Randall took possession of the land has the company been able to operate its claim or do any further mining work thereon.

The Government contended that, if on the facts there was a legal taking or other act entitling petitioner to recover compensation, the cause of action had accrued more than six years prior to the commencement of this suit; and that therefore under § 156 of the Judicial Code the petition should be dismissed. The Court of Claims found that the company's property was taken within the

six years; that is, on December 8, 1900, and that its then reasonable value was $23,800. It entered judgment for that amount (53 Ct. Clms. 424). Both parties appealed; the Government, on the ground that the right of recovery, if any, was barred; the company, on the ground that no compensation was allowed for the use and occupation between the date of the taking and the date of entry of judgment.

First. When the Government without instituting condemnation proceedings appropriates for a public use under legislative authority private property to which it asserts no title, it impliedly promises to pay therefor. *United States* v. *Great Falls Manufacturing Co.*, 112 U. S. 645; *United States* v. *Lynah*, 188 U. S. 445, 462, 465; *United States* v. *Cress*, 243 U. S. 316, 329. But although Congress may have conferred upon the Executive Department power to take land for a given purpose, the Government will not be deemed to have so appropriated private property, merely because some officer thereafter takes possession of it with a view to effectuating the general purpose of Congress. See *Ball Engineering Co.* v. *J. G. White & Co.*, 250 U. S. 46, 54–57. In order that the Government shall be liable it must appear that the officer who has physically taken possession of the property was duly authorized so to do, either directly by Congress or by the official upon whom Congress conferred the power.

The Acts of March 3, 1899, c. 423, 30 Stat. 1064, 1070, and May 26, 1900, c. 586, 31 Stat. 205, 213, making appropriations for barracks and quarters for troops, furnish sufficient authorization from Congress to take land for such purposes, so that the difficulty encountered by the claimant in *Hooe* v. *United States*, 218 U. S. 322, does not exist here. But the power granted by those acts was conferred upon the Secretary of War. Act of August 1, 1888, c. 728, § 1, 25 Stat. 357; Act of August 18, 1890, c. 797, § 1, 26 Stat. 316. It was for him to determine whether

the army post should be established and what land should be taken therefor. Compare *Nahant* v. *United States*, 136 Fed. Rep. 273; 153 Fed. Rep. 520; *United States* v. *Certain Lands in Narragansett, R. I.*, 145 Fed. Rep. 654. Power to take possession of the company's mining claim was not vested by law in General Randall; and the Secretary of War had not, so far as appears, either authorized it or approved it before December 8, 1900. It was only after the President reserved from sale and set aside for military purposes the large tract of land in which the company's mining claim was included that the Secretary of War took action which may be deemed an approval or ratification of what General Randall had done. What he had done before that date, having been without authority and hence tortious, created no liability on the part of the Government. *Hijo* v. *United States*, 194 U. S. 315, 323. Since the cause of action arose after December 7, 1900, this suit was not barred by § 156 of the Judicial Code.

The suggestion is made that, as the President's order reserved the land "subject to any legal rights which may exist to any land within its limits," the Secretary's action thereafter was not a taking of the mining claim. But this clause and the reference to it in the announcement made by the Secretary must, in view of the circumstances, have meant merely that the right to compensation of the company and of any others was preserved. Furthermore, the suggestion if sound would not aid the Government; it would result, at most, in slightly postponing the date of the legal taking. For the continued holding possession of the land after the announcement of the Secretary of War and the erection of buildings thereon by his authority was such an appropriation as would, in any event, give the right of action against the Government.

Second. The company contends that it should receive, in addition to the value of the property at the time of the taking, compensation for the occupation and use

thereof from that date to the date of the judgment—a period of nearly twenty years during which the company was deprived of the use of its property. This contention is based upon the decisions of many state courts that, upon the taking of private property for public uses, the owner is entitled to recover, besides its value at the time of the taking, interest thereon from the date on which he was deprived of its use to the date of payment.[1] In a number of cases in the lower federal courts also the landowner has been permitted to recover interest from the time of the taking; but in each such case a statute had provided in some form that the condemnation should be conducted according to the laws of the State in which the land was situated—and under the law of the State interest was recoverable. *United States* v. *Engeman*, 46 Fed. Rep. 898; *Town of Hingham* v. *United States*, 161 Fed. Rep. 295, 300; *United States* v. *Sargent*, 162 Fed. Rep. 81; *United States* v. *First National Bank*, 250 Fed. Rep. 299; *United States* v. *Rogers*, 257 Fed. Rep. 397; *United States* v. *Highsmith*, 257 Fed. Rep. 401. These conformity provisions which relate only to the laws of States, can have no application to lands in Alaska; nor can they affect proceedings brought in the Court of Claims.

The right to bring this suit against the United States in the Court of Claims is not founded upon the Fifth Amendment, *Schillinger* v. *United States*, 155 U. S. 163, 168; *Basso* v. *United States*, 239 U. S. 602, but upon the existence of an implied contract entered into by the United States. *Langford* v. *United States*, 101 U. S. 341; *Bigby* v. *United States*, 188 U. S. 400; *Tempel* v. *United States*, 248 U. S. 121, 129; *United States* v. *Great Falls Manufacturing Co., supra; United States* v. *Lynah, supra.* And the contract which is implied is to pay the value of property as of the date of the taking. *Bauman* v. *Ross*,

[1] See cases collected in 15 Cyc., pp. 930, 931, and in 10 R. C. L., p. 163.

167 U. S. 548, 587; *United States* v. *Honolulu Plantation Co.*, 122 Fed. Rep. 581, 585; *Burt* v. *Merchants' Insurance Co.*, 115 Massachusetts, 1, 14. Interest may not be added because § 177 of the Judicial Code, re-enacting § 1091 of the Revised Statutes, declares that: "No interest shall be allowed on any claim up to the time of the rendition of judgment thereon by the Court of Claims, unless upon a contract expressly stipulating for the payment of interest." *Tillson* v. *United States*, 100 U. S. 43. Congress, in thus denying to the court power to award interest, adopted the common-law rule that delay or default in payment (upon which, in the absence of express agreement, the right to recover interest rests), cannot be attributed to the sovereign. *United States* v. *North Carolina*, 136 U. S. 211, 216. That rule had theretofore been uniformly applied in our executive departments except where statutes provided otherwise. *United States* v. *Sherman*, 98 U. S. 565, 567–8. So rigorously is the rule applied, that, in the adjustment of mutual claims between an individual and the Government, the latter has been held entitled to interest on its credits although relieved from the payment of interest on the charges against it. *United States* v. *Verdier*, 164 U. S. 213, 218–219. This denial of interest, like the refusal to tax costs against the United States in favor of the prevailing party, *Stanley* v. *Schwalby*, 162 U. S. 255, 272; *Pine River Logging Co.* v. *United States*, 186 U. S. 279, 296, and the refusal to hold the United States liable for torts committed by its officers and agents in the ordinary course of business, *Crozier* v. *Krupp*, 224 U. S. 290, are hardships from which, with rare exceptions, *William Cramp & Sons Co.* v. *Curtis Turbine Co.*, 246 U. S. 28, 40–41, Congress has been unwilling to relieve those who either voluntarily deal with the Government or are otherwise affected by its acts.

The company argues that interest is allowed in condemnation proceedings, not *qua* interest for default or

delay in paying the value, but as the measure of compensation for the use and occupation during the period which precedes the passing of the title (see *Klages* v. *Philadelphia & Reading Terminal Co.*, 160 Pa. St. 386); and that collection of an amount, measured by interest, is not prohibited either by the statute limiting the powers of the Court of Claims or by the common-law rule which exempts the sovereign from liability to pay interest. *United States* v. *New York*, 160 U. S. 598, 622. This may be the theory on which interest should be allowed in compensation proceedings;[1] and it may be that, even in the absence of the conformity provision referred to above, interest could be collected as a part of the just compensation in condemnation proceedings brought by the Government. For, as suggested in *United States* v. *Sargent*, *supra*, such a proceeding is not a suit by the landowner to collect a claim against the United States, but an adversary proceeding in which the owner is the defendant and which the Government institutes in order to secure title to land. *Mason City & Fort Dodge R. R. Co.* v. *Boynton*, 204 U. S. 570. On the other hand, this suit brought in the Court of Claims is a very different proceeding. It is an action of contract to recover money which the United States is assumed to have promised to pay; and the assumed promise was to pay the value at the time of the taking. The suit is in effect an action on two counts—one for the value of the mining claim, the other for use and occupation after December 8, 1900, at the rate of $7,500 per year. If the company had brought the suit immediately after the taking, it clearly could not have recovered any amount for use and occupation; for a plaintiff suing in contract

[1] Compare *Moll* v. *Sanitary District*, 228 Illinois, 633, 636; *Lake Roen &c. Co.* v. *McLain Co.*, 69 Kansas, 334, 341–342; *Kidder* v. *Oxford*, 116 Massachusetts, 165; *Hamersley* v. *New York City*, 56 N. Y. 533, 537; *Sioux City R. R. Co.* v. *Brown*, 13 Nebraska, 317, 319; *Atlantic & Great Western Ry. Co.* v. *Koblentz*, 21 Oh. St. 334, 338.

can recover only on a cause of action existing at the time the suit was brought. The loss to the company of the use of $23,800, which is found to be the value of the mining claim when it was taken nearly twenty years ago, must be deemed to be due, in part, to its delay in instituting the suit, and, in part, to the delays of litigation for which it may have been largely responsible. But as, in either event, the loss of the use of the money results from the failure to collect sooner a claim held to have accrued when the company's property was taken, that which the company seeks to recover is, in substance, interest, and that Congress has denied to the Court of Claims power to allow.

Furthermore, if it is not interest which the company seeks, the facts found fail to supply the basis on which any claim in addition to that for the value of the property should rest. The petition states that the United States is indebted to claimant in addition to the $100,000, alleged to be the value of the property, the further sum of $7,500 per annum for the use and occupancy thereof from December 8, 1900. Except for this allegation the company did not, so far as appears, make any request of any kind in the court below in respect to an allowance for use and occupation. The court does not mention the subject in the opinion; and it is not referred to in the application for an appeal.

In *Shoemaker* v. *United States*, 147 U. S. 282, 321, and *Bauman* v. *Ross*, 167 U. S. 548, 598, to which both counsel refer, the point here decided was not involved, since the court held that under the express terms of the acts there in question the United States were not entitled to possession of the land until the damages had been assessed and actually paid.

The judgment below is

Affirmed.

MR. JUSTICE MCREYNOLDS took no part in the consideration and decision of this case.